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No. _____

In The

Supreme Court of the United States

October Term, 1993

BILL HARTBARGER,

Petitioner,

vs.

FRANK PAXTON COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of New Mexico

PETITION FOR WRIT OF CERTIORARI

Attorney at Law

JEFF ROMERO
804 Fifth Street NW
Albuquerque, New Mexico 87102
(505) 242-9000

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

Whether or not the New Mexico Supreme Court's reexamination of facts tried to a jury violates the Fifth, Seventh and Fourteenth Amendments to the United States Constitution.

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On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of New Mexico

PETITION FOR WRIT OF CERTIORARI

Petitioner, BILL HARTBARGER (hereinafter "Hartbarger"), respectfully prays that a Writ of Certiorari issue to review the judgment and opinions of the Supreme Court of the State of New Mexico in which the New Mexico Supreme Court reweighed and reexamined evidence and facts previously decided by a jury and thus reversed a jury verdict awarding $400,000 in compensatory damages, and $100,000 in punitive damages to Hartbarger.

CITATION TO OPINIONS BELOW

The original June 14, 1993 opinion of the Supreme Court of New Mexico is attached, and appears in the

Appendix (p. 1) to this Petition. The revised opinion of the Supreme Court of the State of New Mexico filed July 21, 1993 is attached and appears in the Appendix (p. 23) to this Petition. The July 21, 1993 order of the Supreme Court of the State of New Mexico, amending the original decision of June 14, 1993 is attached and appears in the Appendix (p. 45) to this Petition. The September 15, 1993 order of the Supreme Court of the State of New Mexico, further amending the original decision is attached and appears in the Appendix (p. 46) to this Petition. The September 16, 1993 order of the Supreme Court of the State of New Mexico denying Petitioner's Motion for Reconsideration and Rehearing is attached and appears in the Appendix (p. 47). The October 4, 1993 order of the Supreme Court of the State of New Mexico finally denying Hartbarger's Motion for Rehearing is attached and appears in the Appendix (p. 48) to this Petition.

JURISDICTION OF THE COURT

The Supreme Court's opinion in this matter was filed on June 14, 1993. A timely Motion and Memorandum for Rehearing was filed on June 25, 1993 (Appendix 49 and 51) with addendum filed June 29, 1993 (Appendix 69). As a result, the Supreme Court of the State of New Mexico modified its decision and issued a revised opinion on July 21, 1993, which is set forth in the Appendix (p. 23) to this Petition. Pursuant to New Mexico Supreme Court Rules and case authority, another timely motion and memorandum for rehearing was filed August 5, 1993. (Appendix 72 and 75). As a result, the Supreme Court of New Mexico again revised its opinion by order filed on September 15,

1993, which is set forth in the Appendix (p. 46) to this Petition. A third timely motion for rehearing was filed September 30, 1993, pursuant to the New Mexico Supreme Court Rules and case authority (Appendix 84). The New Mexico Supreme Court's final denial of the motion for rehearing was issued on October 4, 1993 and is set forth in the Appendix (p. 48) to this Petition. This court's jurisdiction is invoked pursuant to Title 28, U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution is set forth in the Appendix (p. 90) to this Petition.

Amendment VII to the United States Constitution is set forth in the Appendix (p. 91) to this Petition. Amendment XIV to the United States Constitution as set forth in the Appendix (p. 92) to this Petition.

STATEMENT OF THE CASE

Hartbarger, a long-term (23 years) employee of Frank Paxton Company, was arbitrarily discharged from his employment and filed a Complaint against Frank Paxton Company and Alan Crownover alleging (1) breach of an implied contract of employment requiring just cause for termination; and (2) intentional infliction of emotional distress. The Complaint was filed in the Second Judicial District Court of New Mexico on June 27, 1989 (R.P. 1). Pursuant to the Rules of Civil Procedure for the district

courts of New Mexico, Hartbarger contemporaneously filed a demand for trial by a six person jury (R.P. 6).

After an eight day trial by jury, the jury entered a verdict in favor of Hartbarger on Hartbarger's breach of contract claim in the amount of $400,000.00 for compensatory damages and $100,000.00 for punitive damages. The jury returned a verdict in favor of Defendant on Hartbarger's claim of intentional infliction of emotional distress. The verdict was filed on April 8, 1991 (R.P. 371). A judgment on the jury verdict was filed on April 16, 1991 (R.P. 393).

Paxton appealed the verdict to the New Mexico Supreme Court on May 15, 1991 (R.P. 407), posting a Supersedeas Bond in the amount of One Million Dollars in order to stay execution (R.P. 403). Briefing was completed on February 6, 1992. Oral argument was held on March 10, 1992.

On June 14, 1993, the Supreme Court of New Mexico reversed the jury verdict previously rendered in favor of Hartbarger (App. 1). In reviewing the jury verdict, the New Mexico Supreme Court reviewed, reweighed, reinterpreted and minimized the evidence which the jury had considered in determining the existence of an implied employment contract requiring just cause for termination.

On June 25, 1993, Hartbarger filed a Motion for Rehearing (App. 49) and Memorandum (App. 51) clearly objecting to the New Mexico Supreme Court's reweighing the evidence presented to the jury and upon which they found the existence of an implied contract of employment requiring just cause for termination. Hartbarger objected to the Supreme Court's failure to indulge all reasonable

inferences in support of the verdict and disregard all evidence and inferences to the contrary. Hartbarger asked in the alternative that the case be remanded for a new trial based on the newly announced requirement of an "explicit" offer or promise in an "implied" employment contract.

On July 21, 1993, the New Mexico Supreme Court filed a revised opinion (App. 23) in which the Court retreated from its prior requirement that an implied contract contain an explicit offer or promise, requiring it to be "sufficiently explicit" (still a new requirement). The Court also modified its June 14 decision by recognizing that the reasonableness of expectations giving rise to an implied contract of employment could be measured by conduct and just how sufficiently definite, specific or explicit the conduct relied upon has been. The Court also retreated from its prior position that as a matter of policy, it would refuse to consider any evidence that a company does not usually fire employees without a good reason as evidence that it does not maintain an at-will policy. Nonetheless, the New Mexico Supreme Court reversed the verdict of the trial jury and refused to remand for a new trial.

Under Rule 12-404, of the New Mexico Supreme Court rules, Hartbarger timely filed another Motion (App. 72) and Memorandum (App. 75) for Reconsideration and Rehearing on August 5, 1993, in which Hartbarger again clearly indicated that the existence of an implied contract of employment requiring just cause for termination was a factual issue already decided by the jury. Hartbarger also clearly raised the issue that failure

to remand for a new jury trial denied Hartbarger procedural due process rights guaranteed by the Fourteenth Amendment to the United States Constitution. As a result of Hartbarger's second Motion for Rehearing, the Court on September 15, 1993 (App. 46), again modified its position, but only to the extent that as a matter of policy, the Court would not consider evidence that a company does not usually fire employees without a good reason as *by itself* establishing the company does not maintain an at-will employment policy. Again, the New Mexico Supreme Court refused to remand for a new trial on the issue on the basis of the new requirement of a "sufficiently explicit" offer or promise.

Hartbarger again timely filed a Motion and Memorandum for Reconsideration and Rehearing on September 30, 1993 (App. 84), in which Hartbarger clearly reiterated the evidence upon which the jury's original verdict was based and again asked that the Court affirm the judgment of the jury or in the alternative, remand the case for new trial. On October 4, 1993, the New Mexico Supreme Court denied Hartbarger's Motion for Rehearing and Reconsideration (App. 48).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because the New Mexico Supreme Court reexamined facts previously tried to a jury, violating the Seventh Amendment prohibition against such reexamination and violating Hartbarger's Fifth and Fourteenth Amendment Rights to due

process. The question of whether the Seventh Amendment prohibition against reexamination of facts tried to a jury should be applied to the States, has not been a question directly resolved by this court.

1. The U.S. Supreme Court has never directly ruled whether or not the Seventh Amendment Prohibition against reexamination of facts tried to a jury applies to the states.

The only U.S. Supreme Court cases which touch on this subject are *Justices v. Murray*, 76 U.S. (9 Wall.) 274, 19 L.Ed 658 (1870); *Chicago B. & Q. R. Co. v. City of Chicago*, 166 U.S. 236 (1897); and *Chicago R.I. and P. Railway Company v. Cole, Etc.*, 251 U.S. 54 (1919).

In *Justices v. Murray*, two questions were presented to this Court.

> 1. Whether or not the Act of Congress of March 3, 1863, providing for the removal of a cause after judgment by state court to the circuit court of the United States, for a new trial, is an act in pursuance of the Constitution of the United States.
>
> 2. Whether or not the provision in the Seventh Amendment of the Constitution of the United States, which declares that no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of common law, applies to the facts tried by a jury in a cause in a state court.

Cite. 76 U.S. (9 Wall) 276-277.

At issue was the constitutionality of the Act of Congress of March 3, 1863, insofar as it allowed a federal court to reexamine facts tried by a state jury before the cause was removed to federal court. The Court held:

> Our conclusion is, that so much of the Fifth Section of the Act of Congress, March 3, 1863, entitled "An Act Relating to Habeas Corpus, and Regulating Proceedings in Certain Cases," as provides for the removal of a judgment in a state court, and in which the cause was tried by a jury, to the circuit court of the United States for a retrial on the facts and law, is not in pursuance of the Constitution, and is void.

76 U.S. (9 Wall), 282.

This court, in refuting the argument that the second clause of the Seventh Amendment applied only to cases tried in federal court to a jury, acknowledged that "the ten amendments proposed by Congress, and adopted by the states are limitations upon the powers of the federal government, and not upon the states . . . " 76 U.S. (9 Wall) at 278. As an example, this court stated, in *dicta*, as follows:

> This is admitted, and it follows that the Seventh Amendment could not be invoked in a state court to prohibit it from reexamining, on a writ of error, facts that had been tried by a jury in the court below.

The aforequoted statement was not necessary to the decision of the Court and constitutes *dicta*.

In *Chicago B. & Q. R. Co. v. City of Chicago, supra*, the Court again reiterated its position that the Seventh

Amendment prohibits the Supreme Court's reexamination of facts tried by a state jury. However, it did not address the issue of whether that same Seventh Amendment prohibited state appellate courts from reexamining issues tried by the jury.

In *Chicago Rock Island and Pacific Railway Co. v. Cole, supra,* the issue was whether or not the Constitution prevented states from leaving the defense of contributory negligence to the jury in all cases. In that case, the defense of contributory negligence was left to the jury, which found a verdict for the plaintiff. Justice Holmes, in *dicta,* which was not necessary to the decision in the case, stated:

> There is nothing, however, in the Constitution of the United States or its amendments that requires a state to maintain the line with which we are familiar between the functions of the jury and those of the court. It may do away with the jury altogether. *Walker v. Sauvinet,* 92 U.S. 90, modify its constitution, *Maxwell v. Dow,* 176 U.S. 581, the requirements of a verdict, *Minneapolis and St. Louis Railroad Co. v. Bombolas,* 241 U.S. 211; or the procedure before it, *Twining v. New Jersey,* 211 U.S. 78, 111. *Frank v. Magnum,* 237 U.S. 309, 340"

251 U.S. at 56.

It should be noted that the second clause of the Seventh Amendment has been determined to be "a substantial and independent clause." *Justices v. Murray, supra,* 76 U.S. at 277 (citing *Parsons v. Bedford,* 3 Pet. 447, 448).

2. The Prohibition Against Reexamination of Facts Tried to a Jury is Fundamental to the American scheme of justice.

Since the time of the decisions of this court in *Justices v. Murray, supra*; *Chicago B. & Q. R. Co. v. City of Chicago, supra*; and *Chicago Rock Island and Pacific Railway Co. v. Cole, supra*, this court has recognized that many of the rights guaranteed by the first eight amendments to the U.S. Constitution are now protected against state action by the due process clause of the Fourteenth Amendment. *Chicago B & Q. R. Co. v. Chicago, supra* (protecting the right to compensation for property taken by the state); *Fiske v. Kansas*, 274 U.S. 380 (1927) (First Amendment Rights of Speech, Press and Religion); *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment Right against unreasonable searches and seizures and exclusionary rule); *Malloy v. Hogan*, 378 U.S. 1 (1964) (Fifth Amendment Right against Self-Incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (Sixth Amendment Right to Counsel); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (Sixth Amendment Right to Speedy Trial); *In Re Oliver*, 333 U.S. 257 (1948) (Sixth Amendment Right to Public Trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (Sixth Amendment Right to confront opposing witnesses); *Washington v. Texas*, 388 U.S. 14 (1967) (Sixth Amendment Right to compulsory process for obtaining witnesses); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Sixth Amendment right to trial by jury).

Justice White, in *Duncan v. Louisiana, supra*, reviewed the various tests which had been used in determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also

protected against state action by the Fourteenth Amendment. He stated:

> The question has been asked whether a right is among those "fundamental principals of liberty and justice which lie at the base of our civil and political institutions," *Powell v. Alabama*, 287 U.S. 45, 67 (1932); whether it is "basic in our system of jurisprudence," *In Re Oliver*, 333 U.S. 257, 273 (1948); and whether it is 'a fundamental right essential to a fair trial,' *Gideon v. Wainwright*, 372 U.S. 335, 343-344 (1963); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964); *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

391 U.S. at 148-149.

In *Duncan v. Louisiana, supra*, the position of the state of Louisiana was that the Constitution imposes on the states, "no duty to give a jury trial in any criminal case regardless of the seriousness of the crime or the size of the punishment which may be imposed." 391 U.S. at 149. That is an argument similar to the one used by Justice Holmes in stating that the U.S. Constitution imposes no requirement that a state maintain the line between the functions in the jury and those of the court.

In *Benton v. Maryland*, 395 U.S. 784 (1969), this court has asserted the rule that once it is decided that a particular Bill of Rights guarantee is fundamental to the American scheme of justice, the same constitutional standards apply against both the state and federal governments. This has been sometimes referred to as the doctrine of "selective incorporation." 18 L.Ed.2d 1388, 1392.

Even under earlier cases, the view was taken that the Fourteenth Amendment made obligatory on the states

those provisions of the Bill of Rights which were fundamental or essential to a fair trial, not because they were enumerated in the first eight Amendments, but because they were of such a nature that they were included in the concept of due process of law. *Powell v. Alabama*, 287 U.S. 45 (1932) quoting from *Twining v. New Jersey*, 211 U.S. 78 (1908).

The Seventh Amendment's prohibition against reexamination of facts tried to a jury is just such a guarantee fundamental to the American scheme of justice. Once a jury has decided facts, an appellate court should not be allowed to second guess the determination of the jury which had the opportunity to review the evidence, listen to the live testimony of witnesses, determine the credibility of those witnesses by examining their demeanor and manner of testifying, the ability of the witness to withstand cross-examination and the logic of their testimony.

Whether a particular Bill of Rights guarantee is fundamental to the American scheme of justice should be examined on the assumption that state civil processes are "actual systems bearing virtually every characteristic of the common law system that has been developing contemporaneously in England and in this country." Footnote 14, *Duncan v. Louisiana, supra* at 149. New Mexico, like most states in the United States, recognizes that appellate courts may not reweigh the evidence. *Clovis National Bank v. Harmon*, 102 N.M. 166, 692 P.2d 1353 (1984). *Newberry v. Allied Stores Inc.*, 108 N.M. 424, 428, 773 P.2d 1231 (1989). The prohibition against reexamining facts tried to a jury, is therefore fundamental to the American scheme of justice. The due process clauses of the

Fifth and Fourteenth Amendments should prohibit a state appellate court from reexamining facts tried to a jury.

3. The New Mexico Supreme Court reexamined the facts tried by the jury.

The New Mexico Supreme Court recognized that "the jury below found that there was an implied employment contract between Hartbarger and Paxton permitting termination only for just cause." Hartbarger Opinion (Appendix 4 and 26). The Court also recognized as follows:

> An implied in fact contract term . . . is one that is *inferred from the statements or conduct* of the parties. It is not a promise defined by the law, but one made by the parties, though not expressly. (Emphasis added)

(Appendix 6 and 28)

The court also recognized that the existence of an implied employment contract requiring good cause for termination is to be determined from the "totality of the evidence." (Appendix 21 and 43)

The New Mexico Supreme Court in its revised opinion of July 21, 1993 stated as follows:

> An employer creates expectations by establishing policies or making promises. An implied contract is created only where an employer creates a reasonable expectation. The reasonableness of expectations is measured by just how

> definite, specific, or explicit has been the representation or conduct relied upon.

(Appendix 35-36)

The court then commenced to reexamine, reweigh, reevaluate and reinterpret and minimize the evidence consisting of an employee handbook (Appendix 14-16 and 36-38); Paxton's custom of retaining employees for long term; the practice of firing employees only for good reason (Appendix 16-17 and 38-39); oral statement by Hartbarger's supervisor (Appendix 17-19 and 39-41); written statements by Hartbarger's supervisor (Appendix 19-20 and 41-42); and Paxton's retirement plan (Appendix 20-21 and 42-43).

The employment handbook listed actions leading to severe disciplinary action or discharge, none of which encompassed any of Hartbarger's actions leading up to his discharge. The court reweighed the evidence when it said:

> We see no reason why the list should be deemed inclusive of all reasons for which an employee might be disciplined or terminated, or indeed, why the list should preclude discharge for no reason at all.

(Appendix 16 and 38).

The court again reexamined and reweighed the evidence of Paxton's custom of retaining employees for long periods of time and its practice of usually firing employees only for good reason. The court reweighed the evidence when it stated:

> As a matter of policy, this court refuses to consider evidence that a company does not usually

> fire employees without a good reason as any indication ("establishing" in 7/21/93 Opinion) the company does not maintain an at-will employment policy.

(Appendix 17 and 39).

This language was later modified in the court's September 15, 1993 decision (Appendix 46) as follows:

> As a matter of policy, this court will not consider evidence that a company does not usually fire employees without a good reason as *by itself* establishing that the company does not maintain an at-will employment policy.

The court again reweighed evidence when it determined that oral statements made by Hartbarger's supervisor that as long as Hartbarger kept up his sales and took care of what he was doing, he would not have anything to worry about if another company took over Paxton. The New Mexico Supreme Court stated:

> Looking at the conversation in context, there is no reasonable interpretation of Crownover's comments that would lead one to believe that Crownover was either making a promise or reaffirming an earlier promise that Hartbarger was anything other than an at-will employee.

(Appendix 19 and 41).

The New Mexico Supreme Court also reweighed evidence consisting of written statements made by Hartbarger's supervisor. Hartbarger's supervisor filled out a verification of employment in which he indicated that the probability of Hartbarger's continued employment was "excellent" and that Hartbarger was "likely to continue to

receive overtime or bonus pay." The New Mexico Supreme Court stated:

> The statements were made to the lender, not to Hartbarger, and clearly could not indicate a modification of the employment relationship.

(Appendix 19 and 42).

When it came to a written statement that Hartbarger's supervisor gave him in the form of an evaluation listing performance deficiencies which constituted justification for a disciplinary reduction in commission (and impliedly recognized the requirement of just cause for discipline), the court stated:

> That written statement cannot be construed as modifying the employment contract or as indication of an implied contract because it contains no statements regarding future employment conditions and was not given to Hartbarger until the meeting that concluded with his termination.

(Appendix 20 and 42).

The employment handbook indicated that Paxton would vigorously resist pension claims presented by employees involved in theft, conversion or embezzlement of company property, and that benefits were subject to forfeiture if the employee was discharged for theft of company property. The Court reexamined this evidence indicating that it was not inconsistent with an at-will employment policy. (Appendix 21 and 43).

Hartbarger pointed out in his Brief in Support of Motion for Rehearing filed June 25, 1993 (Appendix 64), that the New Mexico Supreme Court had usurped the

role of the jury or fact finder, ignoring the substantial evidence which existed to support the verdict, including but not limited to the facts outlined above, and the facts that Hartbarger had worked for Paxton for more than twenty years, (Appendix 2 and 24); that Exhibit 38 referred to a policy of insuring employment for a lifetime and statements by Crownover that Paxton was like a "family." Hartbarger's Brief in Support of Motion for Rehearing (Appendix 66).

Finally, the New Mexico Supreme Court reweighed the evidence without having the benefit of determining the credibility of witnesses, observing their demeanor or their manner of testifying, especially Hartbarger's supervisor. In all of the foregoing, the New Mexico Supreme Court flagrantly reweighed the evidence in violation of Hartbarger's rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution, and clearly in violation of the prohibition contained in the second clause of the Seventh Amendment to the United States Constitution.

4. The Supreme Court of New Mexico denied Hartbarger due process of law in violation of the Fifth and Fourteenth Amendments when it modified the law of implied employment contracts in New Mexico, but then refused to remand for a new trial.

The New Mexico Supreme Court had previously held that at-will employment was a rebuttable presumption, and that whether that presumption had been rebutted, was a fact determination to be gathered from the totality of circumstances including employment manuals, words,

and conduct of the parties. *Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 766 P.2d 280 (1988), *cert. denied*, 490 U.S. 1109 (1989). In the Hartbarger opinion, the New Mexico Supreme Court established a new requirement that there must exist a "sufficiently explicit" offer or promise to terminate only for just cause in order to have an implied employment contract. (Appendix 12 and 34). It was no longer sufficient that the totality of all the evidence overcame the presumption of at-will employment. Now it must be shown that there was a "sufficiently explicit" offer or promise.

The New Mexico Supreme Court, in thus ruling, refused Hartbarger's repeated requests to remand this case for a new trial. This violates every concept of fundamental fairness recognized by the U.S. Supreme Court. The law was changed, and yet Hartbarger was prevented from a trial based on these new changes.

This Court has held:

> (T)he requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps. *Wilner v. Committee on Character and Fitness*, 373 U.S. 96, 105 (1963)

CONCLUSION

In conclusion, for the reasons stated above, a writ of certiorari should be issued to review the judgment and opinion of the New Mexico Supreme Court in this matter.

This 30th day of December, 1993.

Respectfully submitted,

Attorney at Law
JEFF ROMERO

Attorney for Petitioner

Attorney at Law
JEFF ROMERO
804 Fifth Street NW
Albuquerque, NM 87102
(505) 242-9000

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

BILL HARTBARGER, No. 19,913

Plaintiff-Appellee,

vs.

FRANK PAXTON COMPANY,

Defendant-Appellant.

APPEAL FROM
THE DISTRICT COURT OF BERNALILLO COUNTY

Philip R. Ashby, District Judge

Albert N. Thiel, Jr.
Albuquerque, NM

Jeffrey Romero
Albuquerque, NM

for Appellant
for Appellee

OPINION

Ransom, Chief Justice.

This appeal is taken from a judgment entered on a jury verdict in favor of Bill Hartbarger in his action against his former employer, Frank Paxton Company, and the supervisor who fired him, Alan Crownover, for breach of an implied contract of employment. Hartbarger worked as an outside salesperson and was terminated after refusing to accept a lower rate of commission on his sales. Paxton argued there was no implied contract and, therefore, Hartbarger was an at-will employee and no justification was needed for the firing, or alternatively, if there was an implied contract, sufficient justification existed to fire Hartbarger. The jury found there was an

implied contract requiring just cause for termination and that the contract was breached, and awarded Hartbarger $400,000 in compensatory damages and $100,000 in punitive damages. Paxton raises numerous points on appeal, essentially arguing that a reasonable jury could not have found there was an implied contract of employment, that if there was a contract it was not breached, and that there was no basis for the award of punitive damages. We reverse.

Facts surrounding termination. Hartbarger worked for Paxton for more than twenty years during two periods, the last one beginning in 1977 and ending with his termination in 1987. At the time of his termination, Hartbarger was employed as one of several sales persons working out of Paxton's Albuquerque operation. Paxton paid its outside sales staff a base salary plus a commission for sales that exceeded a particular amount per month. The commission percentage had varied over the course of Hartbarger's employment from as high as 4¾ percent to as low as 2 percent. Hartbarger's commission had been cut before, once for disciplinary reasons and on another occasion to bring the Albuquerque commission structure more in line with the commissions paid at Paxton's other locations around the country. Just before his termination, Hartbarger's commission rate was 2½ percent, while the commissions of Paxton's other Albuquerque salespersons were 2 percent. Paxton does not dispute that Hartbarger often had the highest sales of the three Albuquerque-based salespersons and that his sales were the highest in the Albuquerque office at the time of his termination.

Hartbarger's sales volume was one reason why Hartbarger had a higher commission rate than the other Albuquerque-based salespersons.

Crownover testified that in the months before the termination he had become dissatisfied with the quality of Hartbarger's work effort and recounted several of Hartbarger's perceived improprieties. In February 1987, Crownover wrote an employee evaluation, which he gave to Hartbarger at a March meeting, along with an oral evaluation. Hartbarger testified that Crownover told him that he was (1) not putting forth 100 percent effort, (2) not cooperating, (3) not observing company policies, (4) not taking the initiative (had to be forced), and the (5) his dependability was lacking. After Hartbarger signed the evaluation form, Crownover told him that "it's going to cost you another half percent of your commission." Hartbarger told Crownover that he could not take a cut like that. (When Hartbarger's commission rate had been cut to 2 percent before, after a few months he told Crownover that he needed more money, and Crownover responded with an increase to $2^1/_2$ percent.) Crownover offered Hartbarger three choices: accept the cut, resign, or be fired. After a pause, Crownover asked what it was going to be. Hartbarger replied that he could not take the first two choices and Crownover said, "Then I guess you're fired." The parties agree that Paxton could change the commission rate at any time and did not need the employee's permission to do so, but Hartbarger argues that implied in the choices presented to him by Crownover was an expectation for productive negotiation and that there was no good cause for an abrupt firing.

Implied employment contracts. The general rule in New Mexico is that an employment contract is for an indefinite period and is terminable at the will of either party unless the contract is supported by consideration beyond the performance of duties and payment of wages or there is an express contractual provision stating otherwise. *Melnick v. State Farm Mut. Auto. Ins. Co.*, 106 N.M. 726, 730, 749 P.2d 1105, 1109, *cert. denied*, 488 U.S. 822 (1988). An at-will employment relationship can be terminated by either party at any time for any reason or no reason, without liability. *Id.* New Mexico courts have recognized two additional exceptions to the general rule of at-will employment: wrongful discharge in violation of public policy (retaliatory discharge), and an implied contract term that restricts the employer's power to discharge. *Id.* The jury below found that there was an implied employment contract between Hartbarger and Paxton permitting termination only for just cause.

This Court has upheld findings of an implied employment contract provision that restricted the employer's power to discharge where the facts showed that the employer either has made a direct or indirect reference that termination would be only for just cause or has established procedures for termination that include elements such as a probationary period, warnings for proscribed conduct, or procedures for employees to air grievances. *See Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 427, 773 P.2d 1231, 1234 (1989) (upholding finding of implied contract based on employee manual, words, and conduct of parties); *Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 24-26, 766 P.2d 280, 284-86 (1988) (affirming finding of implied contract based on words and conduct of parties),

cert. denied, 490 U.S. 1109 (1989); *Lukoski v. Sandia Indian Management Co.*, 106 N.M. 664, 667, 748 P.2d 507-510 (1988) (upholding finding of oral contract amended by employee handbook); *Forrester v. Parker*, 93 N.M. 781, 782, 606 P.2d 191, 192 (1980) (holding that, when terminating non-probationary employee, employer is bound by policies established in "personnel policy guide" that control the employer-employee relationship). We have upheld findings that there was no implied contract in cases where the alleged promise by the employer was not sufficiently explicit. *See Shull v. New Mexico Potash Corp.*, 111 N.M. 132, 135, 802 P.2d 641, 644 (1990) (affirming summary judgment in favor of employer where employee had no bargained-for expectations and employee handbook did nothing to alter at-will relationship); *Sanchez v. The New Mexican*, 106 N.M. 76, 79, 738 P.2d 1321, 1324 (1987) (affirming grant of directed verdict in favor of employer where language in employee handbook was of a non-promissory nature and was merely a declaration of employer's general approach to the subject matter discussed).

Implied employment contract restricting employer's power to discharge employee is an implied-in-fact contract. The question whether an employment relationship has been modified is a question of fact. *Lukoski*, 106 N.M. at 666, 748 P.2d at 509. A promise, or offer, that supports an implied contract might be found in written representations such as an employee handbook, in oral representations, in the conduct of the parties, or in a combination of representations and conduct. *See Newberry*, 108 N.M. at 427, 773 P.2d at 1234 (totality of the parties' relationship, circumstances, and objectives are to be considered in

determining whether presumption of at-will employment has been rebutted); *Kestenbaum*, 108 N.M. at 24, 766 P.2d at 284 (same). When such a contract is implied, it is implied in fact. *Wagenseller v. Scottsdale Memorial Hosp.*, 7100 P.2d 1025, 1036 (Ariz. 1985) (*en banc*) ("An implied-in-fact contract term . . . is one that is inferred from the statements or conduct of the parties. It is not a promise defined by the law, but one made by the parties, though not expressly." (citation omitted)).

Implied employment contracts do not require a factual showing of additional consideration or mutual asset to the implied term. Ordinarily, to be legally enforceable, a contract must be factually supported by an offer, an acceptance, consideration, and mutual asset. *See* SCRA 1986, 13-801 (Repl. Pamp. 1991) (definition of contract); *Romero v. Earl*, 111 N.M. 789, 791, 810 P.2d 808, 811 (1991) (stating consideration adequate to support a promise is essential to enforcement of the contract and must be bargained for by the parties); *Trujillo v. Glen Falls Ins. Co.*, 88 N.M. 279, 280, 540 P.2d 209, 210 (1975) (holding mutual assent in contract law is elementary and it must be expressed by the parties).

– *Consideration.* Paxton challenges the sufficiency of the evidence to support an implied contract because there was no evidence that Hartbarger gave additional consideration for any agreement beyond at-will employment.[1] *See Gonzales v. United Southwest Nat'l Bank*, 93 N.M. 522, 524, 602 P.2d 619, 621 (1979) (noting uniform rule, in 1979,

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[1] Paxton requested no instruction on consideration and none was given. While failure to raise the issue below should be dispositive, we address the argument as presented on appeal.

that an employment contract for permanent employment not supported by consideration other than performance of duties and payment of wages is terminable at will).[2] *Kestenbaum*, 108 N.M. at 24, 766 P.2d at 284 (agreeing that conduct of employer may be sufficient to create an implied contract requiring just cause for discharge) (citing *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917, 925-26 (Ct.App. 1981); *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880 (Mich. 1980)).

In *Kestenbaum*, we alluded to the principle that additional, independent consideration was not necessary to establish an agreement not to discharge except for good cause, but we did not fully develop the principle. 108 N.M. at 24, 766 P.2d at 284. We cited *Toussaint*, 292 N.W.2d 880, which did discuss the principle to some extent. The court there explained that in determining the termination rights of the parties, job security could be proved by the conduct of the parties, and consideration could be implied from construing that the employer gave up his right to discharge at will as part of the original agreement. *See Toussaint*, 292 N.W. 2d at 890-92. The court

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[2] The term "permanent employment" is susceptible to a variety of interpretations. In one sense, it might refer to employment for an indefinite period. *See Gonzales*, 95 N.M. at 524, 602 P.2d at 621. In another sense it might refer to employment that is terminable only for just cause. In this opinion, the term "permanent employment" is used in the latter sense and is meant to be interchangeable with "terminable for just cause." *See Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 885-90 (Mich. 1980) (discussing interpretation of the term "permanent employment").

rejected the "defendant's claim that the element of consideration . . . limits the enforceability of the employer's promise to those instances in which the employee provides some consideration in addition to the services to be rendered." *Id.* at 900 (Ryan, J., specially concurring). We hold today that where there is proof of a promise sufficient to support an implied contract, the consideration sufficient to support the implied contract will be implied as a matter of law by the court whether the promise was part of the original employment agreement or was made later in modifying the employment relationship.[3]

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[3] Additional consideration may serve an evidentiary function in implied employment contracts, indicating that the parties intended to place a limitation on the employer's right to discharge, *see Pugh*, 171 Cal Rptr. at 925, but the evidentiary function is something distinct from the showing of consideration as an essential element of contract. In stating that a contract with an express or implied term restricting the employer's power to terminate need not be supported by consideration beyond the employee's service. *Pugh* quoted form *Drzewiecki v. H & R Block, Inc.*, 101 Cal. Rptr. 169 (Ct.App. 1972), a case cited with approval in the earlier New Mexico Court of appeals case of *Garza v. United Child Care, Inc.*, 88 N.M. 30, 31, 536 P.2d 1086, 1087 (Ct.App. 1975). In *Drzewiecki*, the court held the rule that should be followed in California is the one set out in *Littell v. Evening State Newspaper Co.*, 120 F.2d 36 (C.C. Cir. 1941). *Drzewiecki*, 101 Cal. Rptr. at 174.

> [W]hen one who enters into a contract of employment[] promises not only that he will give his services but also additional consideration . . . such facts may be sufficient, in each case, to show the intent of the parties to enter into a contract for permanent employment.
>
> . . . [W]here no . . . intent [for permanent employment not terminable except pursuant to express terms] is clearly expressed and, absent evidence which shows other consideration than a promise to render services,

– *Mutual assent.* Paxton next challenges the verdict on the ground that there was insufficient evidence to

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> the assumption will be that – even though they speak in terms of "permanent" employment – the parties have in mind merely the ordinary business contract for a continuing employment, terminable at the will of either party.

Littell, 120 F.2d at 37. In addition to California, a number of courts have adopted that rationale in recent years. *See Hartman v. C.W. Travel, Inc.*, 792 F.2d 1179, 1180-81 (D.C. Cir. 1986) (explaining that presumption that employment is at will applies only when there is no evidence of parties' intent; to determine intent courts look to "such factors as the express terms of the contract, evidence of surrounding circumstances, or the payment of additional consideration"); *Eales v. Tanana Valley Medical-Surgical Group, Inc.*, 663 P.2d 958, 959-960 (Alaska 1983) (stating that the rule that contract for permanent employment is at will unless supported by additional consideration is based on an unsound foundation); *Coelho v. Posi-Seal Int'l, Inc.*, 544 A.2d 170, 176 (Conn. 1988) (adopting position that absence of additional consideration does not invalidate a contract expressing intention that employment not be terminable at will); *Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489, 492 (Ky. 1983) (joining "a number of other jurisdictions" in following the rationale of *Littel*); *Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97, 99-100 (Me. 1984) (holding parties may create employment contract terminable only pursuant to its express terms by clearly stating intention to do so); *Pine River State Bank v. Mettille*, 333 N.W. 2d 622, 629 (Minn. 1983) (holding requirement of additional consideration and presumption of at-will employment are both rule of construction rather than substance and implied contract needs no additional consideration where intention of parties is clear); *see also Eilen v. Tappin's, Inc.*, 83 A.2d 817, 818-19 (N.J. Super. Ct. Law Div. 1951) (explaining that New Jersey had never adopted the additional consideration rule and that the rule "is merely a device created by the courts to test whether or not the parties specifically and definitely intended to make such a contract").

support a finding of the contract element of mutual assent. The jury in this case was given an instruction requiring mutual assent. No objection was made to that instruction,[4] and it is, therefore, the law of this case.

We have not addressed previously the issue of mutual assent in the context of an implied employment contract. In *Kestenbaum*, this Court held, under the same instruction requiring an intention to be bound, that there was substantial evidence to support a finding that the parties agreed to a contract that permitted termination only for good cause. There was no evidence, and no requirement, to prove that the parties overtly manifested their mutual assent to the just cause term of employment. We stated that we agreed with the proposition that *oral statements made by an employer may be sufficient to create an implied contract*. See *Kestenbaum*, 108 N.M. at 24-26, 766 P.2d at 284-286. Similarly, an explicit promise would support the jury's finding of mutual assent here. Further, in *McGinnis v. Honeywell, Inc.*, 110 N.M. 1, 791 P.2d 452 (1990), we determined that the verdict finding an implied contract was supported by evidence sufficient to find an express contract, and that the theory submitted to the jury was broad enough to encompass a finding of express agreement. We then held that "the parties' conduct was sufficient to manifest an intention to be bound by the agreement." *Id.* at 5, 791 P.2d at 456. The employer there established certain policies and procedures to be followed

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[4] The jury was instructed that it could find an implied contract if it found that "the parties by a course of conduct have shown an intention to be bound," Instruction 14, based on SCRA 1986, 13-803 (Orig. Pamp.).

in termination and prepared an employment agreement stating that employment was subject to applicable personnel practices published to employees. The only evidence of the employee's asset to the policies was the signing of the agreement and that the employee commenced and continued to work. *Id.* at 2, 791 P.2d at 453. In *Forrester, Newberry,* and *Lukoski,* the implied contracts were based on employee manuals and the employers' courses of conduct and oral representations. In those cases, the employers issued policy statements and encouraged the employees to rely upon them. However, in each of those cases there was no evidence presented (beyond the fact that the employees commenced or continued to work) that the employees assented to the policies.

When an employer offers to restrict its power to discharge, the employee's asset to the restriction need not be evinced by anything more than commencing or continuing employment. As a matter of public policy, we see no need for any further manifestation of assent. Once the employee has successfully shown that the employer has demonstrated an intent to restrict its power to discharge, absent evidence to the contrary, the court will imply in law that the requirement of mutual assent has been met. There need be no separate factual finding of mutual assent.[5] *Accord Toussaint,* 292 N.W.2d at 892 (holding

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[5] Although in an employment contract, terms of consideration and mutual assent may be implied in law, we reiterate that an implied employment contract providing for termination only for just cause is a contract implied in fact; it is based on explicit representations or conduct. An implied-in-law contract, on the other hand, is a duty imposed by law and requires no assent.

employer statements of policy can give rise to contractual rights without evidence of mutual agreement). In this case *if* Paxton made a sufficiently explicit offer to terminate Hartbarger only for just cause, the same evidence will support a finding of mutual assent. An employer does not have to issue a policy statement limiting its power to discharge, but if the employer chooses to do so and creates a reasonable expectation on the part of the employee, it is bound to fulfill that expectation.

To create an implied contract, the offer or promise must explicit. The at-will presumption that the employee has no reasonable expectation of continued employment applies only to a single term of an employment relationship – that of the employer's unabridged right to terminate the employee. *See Sheets v. Knight*, 799 P.2d 1000, 1008 n.13 (Or. 1989) (at-will employee is one who has no reasonable expectation of continued employment); *Wagenseller*, 710

Restatement (Second) of Contracts § 4 cmt. b (1979) (using the term "quasi contract"). It is not really a contract at all. *See Hydro Conduit Corp. v. Kemble*, 110 N.M. 173, 178-79, 793 P.2d 855, 860-61 (1990) (distinguishing between contract implied in law based on obligations created by law for reasons of justice, and contract implied in fact based on parties' mutual assent as manifested by their conduct). An action for retaliatory discharge, for example, lies not as a breach of contract, but as a tort. *See Vigil v. Arzola*, 102 N.M. 682, 688, 699 P.2d 613, 619 (Ct.App. 1983) (recognizing the tort of retaliatory discharge), *rev'd in part on other grounds*, 101 N.M. 687, 687 P.2d 1038 (1984), *modified by Boudar v. E.G.&G., Inc.*, 106 N.M. 279, 280-81, 742 P.2d 491, 492-93 (1987) (allowing retroactive application), *and overruled in part on other grounds by Chavez v. Manville Prods. Corp.*, 108 N.M. 643, 649-50, 777 P.2d 371, 377-78 (1989) (lowering the burden of proof for retaliatory discharge and allowing recovery of damages for emotional distress).

P.2d at 1036 (discussing exception to at-will presumption as "implied-in-fact contract *term*" (emphasis added)). The right to terminate is the only provision of an employment relationship that is challenged in a case such as the one at bar, where the employee claims that the employer promised that the employee would be discharged only for good cause. In recognizing the so-called "implied employment contract," we actually have recognized only that an implied-in-fact contract term limiting the employer's right to terminate at will may modify the underlying employment relationship.

In examining implied employment contract cases, we always have required that the promise claimed to alter the presumed at-will term explicit. Where the alleged term has arisen in a personnel manual, we have required that the manual control the employment relationship to the point that an employee could reasonably expect his employer to conform to the procedure it outlined. *Newberry*, 108 N.M. at 427, 773 P.2d at 1234. We also have stated that "if an employer does choose to issue a policy statement, in a manual or otherwise, and, by its language or by the employer's actions, encourages reliance thereon, the employer cannot be free to only selectively abide by it." *Lukoski*, 106 N.M. at 667, 748 P.2d at 510 (quoting *Leikvold v. Valley View Community Hosp.*, 688 P.2d at 170, 174 (Ariz. 1984) (*en banc*)); *see also Rowe v. Montgomery Ward & Co.*, 473 N.W.2d 268, 275 (Mich. 1991) (holding that oral statements of job security must be clear and unequivocal to overcome presumption of at-will employment). An employer creates expectations by establishing policies or making promises. An implied contract is created only where an employer creates a reasonable

expectation. To create a reasonable expectation that the employer's right to discharge is restricted, the statement or policy must be explicit.

The evidence in this case was not sufficient to support a finding of an explicit offer or promise to terminate only for just cause. "On appeal, we resolve all disputed facts in favor of the successful party, indulge all reasonable inferences in support of a verdict, and disregard all evidences and inferences to the contrary." *Newberry*, 108 N.M. at 428, 773 P.2d at 1235. We are to consider the totality of the parties' relationship, circumstances, and objectives in determining whether the presumption of at-will employment has been rebutted. Hartbarger has directed this Court's attention to many aspects of the parties' employment relationship, arguing that in totality they demonstrate a sufficient promise to support an implied contract. Under the challenges raised by Paxton, we look only to see if the evidence is sufficient to support a finding that Paxton, by its course of conduct, evinced an intention to discharge Hartbarger only for just cause. There is no assertion that Paxton established policies and procedures for terminations; Hartbarger relies on alleged representations that he would be fired only for just cause.

– *The yellow employee handbook.* Paxton published at least two employee handbooks, one in 1975 or 1976 with a yellow cover and one in 1983 with a red cover. Hartbarger acknowledged receiving a copy of the yellow handbook when he rejoined the company in 1977, but denied having received the red handbook. Both handbooks set out company policies regarding compensation and reasons for discipline, outline the company's retirement plan, and contain other sections of information and

advice. The evidence is sufficient to support the finding that Hartbarger received the yellow handbook and not the red handbook that contains a disclaimer stating that: "The policies in this book are subject to change. . . . They are not conditions of employment, and the language is not to be construed as a contract between [Paxton] and [its] employees. Employment is terminable at the will of either the employee or the Paxton division for which he or she works." For purposes of this appeal, we will accept the finding that only the yellow handbook affected the employment relationship between the parties. *Cf. McGinnis*, 110 N.M. at 4-5, 791 P.2d at 455-56 (holding handbook binding on employment relationship where employee had not been issued a copy but employee helped draft the guide, a copy was available in the department where she worked, employees could review guide on request, and it was published to employees in [sic] sense of having been made generally known to them and proclaimed officially by employer).

Page 10 of the yellow handbook is labeled "Fair and Square Policies." On that page are statements to the effect that Paxton will pay wages that "equal or exceed generally recognized levels prevailing in the area of employment," and that "[e]mployees will be paid and promoted commensurate with ability previously displayed and on length of service." While relating to Paxton's policy of compensation, the "Fair and Square Policies" do not relate to an implied contract requiring just cause for termination. There is no reference to termination on page 10, only general statements relating to Paxton's compensation rates.

Page 11 of the yellow handbook is labeled "Logical and Practical Rules." Near the bottom of the page is a list of "[a]ctions leading to severe disciplinary action or discharge." The list includes, inter alia: dishonesty, insubordination, excessive absenteeism, loafing after previous warnings, abuse of company property, and falsification of any company record for personal benefit. Hartbarger argues that nothing he did is encompassed by any of the categories in that list. We see no reason why the list should be deemed inclusive of all reasons for which an employee might be disciplined or terminated, or indeed, why the list should preclude discharge for no reason at all. There is no statement in the yellow handbook to the effect that the handbook reflects "established procedure regarding suspension of problem employees and termination for those who cannot conform to Company Policy," as there was in the handbook at issue in *Lukoski*, 106 N.M. at 666, 748 P.2d at 509. Neither is there anything suggesting "that the enumerated conduct was the only basis for dismissal, and the rules were consistent with a termination-at-will policy." *Rowe*, 473 N.W.2d at 275 (holding evidence insufficient to support finding of implied contract). We find that there is no language in the yellow handbook that directly or indirectly refers to a policy that Paxton will fire employees only for just cause.

– *Paxton's custom of retaining employees for a long time and Crownover's practice of usually only firing employees for a good reason.* Paxton had a history of maintaining long-term employment relationships. During the time that Hartbarger worked for Paxton, no outside salesperson had been terminated. Crownover testified that it was not his custom and practice to go around firing people and

that when he did fire someone, he usually had a good reason. Hartbarger points to this history of long-term employment and Crownover's testimony as an indication that Paxton did not maintain an at-will employment policy. Paxton responds that long-time employment is not inconsistent with an at-will policy and that it should not be penalized for not having fired employees for no reason. We agree. Paxton's retention of other employees for a long time is in itself no indication that Hartbarger had an implied contract requiring that termination be only for just cause. As a matter of policy, this Court refuses to consider evidence that a company does not usually fire employees without a good reason as any indication that the company does not maintain an at-will employment policy. To do otherwise would encourage employers to occasionally fire employees for no other reason than to show that they maintain the freedom to do so.

– *Oral statements by Crownover.* The only oral statements in evidence by any agent of Paxton are statements Crownover made when Hartbarger approached him out of concern that the family-owned Paxton Company was to be sold. Hartbarger recalled asking Crownover what would happen to the employees if the company was sold. Hartbarger testified that Crownover told him in reply that as long as he kept up his sales and took care of what he was doing he would not have anything to worry about. Hartbarger said Crownover assured him that the company was not the kind of company that would sell out and just leave its employees hanging.

Hartbarger argues that these statements could be, and on appeal should be, interpreted as meaning that he would not be terminated as long as he kept up his sales

and took care of his job, i.e., unless Paxton had just cause. Because we are to consider the totality of the parties' relationship, circumstances, and objectives, we can consider the context in which this assurance was made and evaluate whether the statement was intended, or reasonably could be interpreted by Hartbarger, to be confirmation of an implied contract or a modification of the employment relationship.

The context was that a concerned employee was discussing with his supervisor what might happen to current employees if the company were to be sold. The supervisor's response to the employee's concerns was to reassure the employee. Hartbarger admitted that he was on a friendly basis with Crownover at the time, that the conversation may have been "off the record," that he knew Crownover had no authority to bind the potential new owners if the sale did occur, and that the entire conversation concerned the new owners, not the current ownership. The assurance was not expressed in terms of a contractual promise. *See Sanchez v. The New Mexican*, 106 N.M. at 79, 738 P.2d at 1324 (language of non-promissory nature and merely a declaration of employer's general approach lacks specific contractual terms which might evidence intent to form a contract).

The comments by Crownover, on their face, resemble statements made in *Toussaint* and quoted in *Kestenbaum*, 108 N.M. at 24, 766 P.2d at 284. In *Toussaint*, as in *Kestenbaum*, assurances of job security were made to the employees during the hiring process and might legitimately have given the employee an expectation that he would not be fired without just cause. The *Toussaint* court held that an employer's statements of company policy

and procedure that it will terminate only for cause can give rise to rights enforceable in contract. *See Kestenbaum*, 108 N.M. at 24-25, 766 P.2d at 284-85. In contrast, Crownover was not making a statement of current or future company policy regarding its employment relationship with Hartbarger; he was expressing an opinion as to job security if the company were to be sold.

Looking at the conversation in context, there is no reasonable interpretation of Crownover's comments that would lead one to believe that Crownover was either making a promise or reaffirming an earlier promise that Hartbarger was anything other than an at-will employee. Hartbarger's testimony cannot be construed as describing a bargaining for a change in the employment relationship between Hartbarger and the Paxton ownership at that time.

– *Written statements by Crownover.* About three months before he was fired, Hartbarger applied for a loan. The lender asked Crownover to fill out a verification of employment form in connection with the loan approval process. Crownover stated on the form that Hartbarger's probability of continued employment was "excellent" and that Hartbarger was "likely" to continue to receive overtime or bonus pay, by which Crownover said he meant commissions. Hartbarger points to the verification statement as indicative of an implied contract requiring just cause of termination. We disagree.

The statements were made to the lender, not to Hartbarger, and clearly could not indicate a modification of the employment relationship. The comments made were the same as might be given for an at-will employee who

has been with the company a long time and has been a steady employee. They are not indicative of a modified employment relationship. The comments are no indication that Hartbarger could be terminated only for just cause. They indicate only that, at that time, Crownover did not contemplate firing Hartbarger and thought that he would continue to receive bonuses in the form of commissions. *See Rowe*, 473 N.W.2d at 273 (orally grounded contractual obligation for permanent employment " 'must be based on *more than* an expression of an optimistic hope of a long relationship' ") (emphasis added in *Rowe*) (quoting *Carpenter v. American Excelsior Co.*, 650 F.Supp. 933, 936 n.6 (E.D. Mich. 1987)).

The other written statement that Hartbarger points to as evidence of an implied contract is the evaluation form that was given to Hartbarger at the meeting where Hartbarger was terminated. That written statement cannot be construed as modifying the employment contract or as an indication of an implied contract because it contains no statements regarding future employment conditions and was not given to Hartbarger until the meeting that concluded with his termination.

– *Paxton's retirement plan.* Pages 20 and 21 of the yellow handbook give a brief description of the employee retirement program that was in place at the time. On page 20, the handbook points out that Paxton "will vigorously resist pension claims presented by any employee involved in theft, conversion or embezzlement of company property." On page 21 there is a paragraph providing that employees who are vested in the pension plan may be entitled to receive their retirement benefits from the Paxton plan at their normal retirement date. Benefits

claimed in that manner are subject to forfeiture if the employee was "discharge[d] for theft of company property." There are no references in the retirement program to discharge for any other reason or for voluntary separation.

Hartbarger argues that the retirement plan's policy of contesting benefits if the employee was involved in theft from the company is contra-indicative of an at-will employment policy. We see nothing in the retirement plan that supports Hartbarger's position. The statement that Paxton will contest retirement benefits if termination was for theft of company property is no indication that employees will not be terminated for other reasons. The statement only indicates that a termination for any other reason will not result in a contest of accrued retirement benefits, and that position is consistent with an at-will termination policy.

Totality of the evidence insufficient to support a finding of a promise that employment could be terminated only for just cause. Viewing all of the circumstances of this employment relationship, we hold that the evidence was not sufficient to support a finding that Paxton made an offer or promise sufficiently explicit to support a finding of an implied contract. There was no representation sufficiently explicit to constitute an offer not to terminate Hartbarger except for just cause, thus there could be no implied contract to that effect. Therefore, we reverse the judgment against Paxton and remand with instructions to enter judgment in Paxton's favor.

IT IS SO ORDERED.

/S/ RICHARD E. RANSOM, Chief Justice.

WE CONCUR:

/s/ Seth D. Montgomery, Justice

/s/ Gene E. Franchini, Justice

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

BILL HARTBARGER,

Plaintiff-Appellee,

vs.

No. 19,913

FRANK PAXTON COMPANY,

Defendant-Appellant.

APPEAL FROM
THE DISTRICT COURT OF BERNALILLO COUNTY

Philip R. Ashby, District Judge

Albert N. Thiel, Jr.
Albuquerque, NM — for Appellant

Jeffrey Romero
Albuquerque, NM — for Appellee

OPINION

Ransom, Chief Justice.

This appeal is taken from a judgment entered on a jury verdict in favor of Bill Hartbarger in his action against his former employer, Frank Paxton Company, and the supervisor who fired him, Alan Crownover, for breach of an implied contract of employment. Hartbarger worked as an outside salesperson and was terminated after refusing to accept a lower rate of commission on his sales. Paxton argued there was no implied contract and, therefore, Hartbarger was an at-will employee and no justification was needed for the firing, or alternatively, if there was an implied contract, sufficient justification existed to fire Hartbarger. The jury found there was an implied contract requiring just cause for termination and

that the contract was breached, and awarded Hartbarger $400,000 in compensatory damages and $100,000 in punitive damages. Paxton raises numerous points on appeal, essentially arguing that a reasonable jury could not have found there was an implied contract of employment, that if there was a contract it was not breached, and that there was no basis for the award of punitive damages. We reverse.

Facts surrounding termination. Hartbarger worked for Paxton for more than twenty years during two periods, the last one beginning in 1977 and ending with his termination in 1987. At the time of his termination, Hartbarger was employed as one of several sales persons working out of Paxton's Albuquerque operation. Paxton paid its outside sales staff a base salary plus a commission for sales that exceeded a particular amount per month. The commission percentage had varied over the course of Hartbarger's employment from as high as 4¾ percent to as low as 2 percent. Hartbarger's commission had been cut before, once for disciplinary reasons and on another occasion to bring the Albuquerque commission structure more in line with the commissions paid at Paxton's other locations around the country. Just before his termination, Hartbarger's commission rate was 2½ percent, while the commissions of Paxton's other Albuquerque salespersons were 2 percent. Paxton does not dispute that Hartbarger often had the highest sales of the three Albuquerque-based salespersons and that his sales were the highest in the Albuquerque office at the time of his termination. Hartbarger's sales volume was one reason why Hartbarger had a higher commission rate than the other Albuquerque-based salespersons.

Crownover testified that in the months before the termination he had become dissatisfied with the quality of Hartbarger's work effort and recounted several of Hartbarger's perceived improprieties. In February 1987, Crownover wrote an employee evaluation, which he gave to Hartbarger at a March meeting, along with an oral evaluation. Hartbarger testified that Crownover told him that he was (1) not putting forth 100 percent effort, (2) not cooperating, (3) not observing company policies, (4) not taking the initiative (had to be forced), and the (5) his dependability was lacking. After Hartbarger signed the evaluation form, Crownover told him that "it's going to cost you another half percent of your commission." Hartbarger told Crownover that he could not take a cut like that. (When Hartbarger's commission rate had been cut to 2 percent before, after a few months he told Crownover that he needed more money, and Crownover responded with an increase to $2^1/_2$ percent.) Crownover offered Hartbarger three choices: accept the cut, resign, or be fired. After a pause, Crownover asked what it was going to be. Hartbarger replied that he could not take the first two choices and Crownover said, "Then I guess you're fired." The parties agree that Paxton could change the commission rate at any time and did not need the employee's permission to do so, but Hartbarger argues that implied in the choices presented to him by Crownover was an expectation for productive negotiation and that there was no good cause for an abrupt firing.

Implied employment contracts. The general rule in New Mexico is that an employment contract is for an indefinite period and is terminable at the will of either party unless the contract is supported by consideration beyond the

performance of duties and payment of wages or there is an express contractual provision stating otherwise. *Melnick v. State Farm Mut. Auto. Ins. Co.*, 106 N.M. 726, 730, 749 P.2d 1105, 1109, *cert. denied*, 488 U.S. 822 (1988). An at-will employment relationship can be terminated by either party at any time for any reason or no reason, without liability. *Id.* New Mexico courts have recognized two additional exceptions to the general rule of at-will employment: wrongful discharge in violation of public policy (retaliatory discharge), and an implied contract term that restricts the employer's power to discharge. *Id.* The jury below found that there was an implied employment contract between Hartbarger and Paxton permitting termination only for just cause.

This Court has upheld findings of an implied employment contract provision that restricted the employer's power to discharge where the facts showed that the employer either has made a direct or indirect reference that termination would be only for just cause or has established procedures for termination that include elements such as a probationary period, warnings for proscribed conduct, or procedures for employees to air grievances. *See Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 427, 773 P.2d 1231, 1234 (1989) (upholding finding of implied contract based on employee manual, words, and conduct of parties); *Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 24-26, 766 P.2d 280, 284-86 (1988) (affirming finding of implied contract based on words and conduct of parties), *cert. denied*, 490 U.S. 1109 (1989); *Lukoski v. Sandia Indian Management Co.*, 106 N.M. 664, 667, 748 P.2d 507-510 (1988) (upholding finding of oral contract amended by employee handbook); *Forrester v. Parker*, 93 N.M. 781, 782,

606 P.2d 191, 192 (1980) (holding that, when terminating non-probationary employee, employer is bound by policies established in "personnel policy guide" that control the employer-employee relationship). We have upheld findings that there was no implied contract in cases where the alleged promise by the employer was not sufficiently explicit. *See Shull v. New Mexico Potash Corp.*, 111 N.M. 132, 135, 802 P.2d 641, 644 (1990) (affirming summary judgment in favor of employer where employee had no bargained-for expectations and employee handbook did nothing to alter at-will relationship); *Sanchez v. The New Mexican*, 106 N.M. 76, 79, 738 P.2d 1321, 1324 (1987) (affirming grant of directed verdict in favor of employer where language in employee handbook was of a non-promissory nature and was merely a declaration of employer's general approach to the subject matter discussed).

Implied employment contract restricting employer's power to discharge employee is an implied-in-fact contract. The question whether an employment relationship has been modified is a question of fact. *Lukoski*, 106 N.M. at 666, 748 P.2d at 509. A promise, or offer, that supports an implied contract might be found in written representations such as an employee handbook, in oral representations, in the conduct of the parties, or in a combination of representations and conduct. *See Newberry*, 108 N.M. at 427, 773 P.2d at 1234 (totality of the parties' relationship, circumstances, and objectives are to be considered in determining whether presumption of at-will employment has been rebutted); *Kestenbaum*, 108 N.M. at 24, 766 P.2d at 284 (same). When such a contract is implied, it is implied in fact. *Wagenseller v. Scottsdale Memorial Hosp.*,

7100 P.2d 1025, 1036 (Ariz. 1985) (*en banc*) ("An implied-in-fact contract term . . . is one that is inferred from the statements or conduct of the parties. It is not a promise defined by the law, but one made by the parties, though not expressly." (citation omitted)).

Implied employment contracts do not require a factual showing of additional consideration or mutual asset to the implied term. Ordinarily, to be legally enforceable, a contract must be factually supported by an offer, an acceptance, consideration, and mutual asset. *See* SCRA 1986, 13-801 (Repl. Pamp. 1991) (definition of contract); *Romero v. Earl*, 111 N.M. 789, 791, 810 P.2d 808, 811 (1991) (stating consideration adequate to support a promise is essential to enforcement of the contract and must be bargained for by the parties); *Trujillo v. Glen Falls Ins. Co.*, 88 N.M. 279, 280, 540 P.2d 209, 210 (1975) (holding mutual assent in contract law is elementary and it must be expressed by the parties).

– *Consideration.* Paxton challenges the sufficiency of the evidence to support an implied contract because there was no evidence that Hartbarger gave additional consideration for any agreement beyond at-will employment.[1] *See Gonzales v. United Southwest Nat'l Bank*, 93 N.M. 522, 524, 602 P.2d 619, 621 (1979) (noting uniform rule, in 1979, that an employment contract for permanent employment not supported by consideration other than performance

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[1] Paxton requested no instruction on consideration and none was given. While failure to raise the issue below should be dispositive, we address the argument as presented on appeal.

of duties and payment of wages is terminable at will).[2] *Kestenbaum*, 108 N.M. at 24, 766 P.2d at 284 (agreeing that conduct of employer may be sufficient to create an implied contract requiring just cause for discharge) (citing *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917, 925-26 (Ct.App. 1981); *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880 (Mich. 1980)).

In *Kestenbaum*, we alluded to the principle that additional, independent consideration was not necessary to establish an agreement not to discharge except for good cause, but we did not fully develop the principle. 108 N.M. at 24, 766 P.2d at 284. We cited *Toussaint*, 292 N.W.2d 880, which did discuss the principle to some extent. The court there explained that in determining the termination rights of the parties, job security could be proved by the conduct of the parties, and consideration could be implied from construing that the employer gave up his right to discharge at will as part of the original agreement. *See Toussaint*, 292 N.W. 2d at 890-92. The court rejected the "defendant's claim that the element of consideration . . . limits the enforceability of the employer's

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[2] The term "permanent employment" is susceptible to a variety of interpretations. In one sense, it might refer to employment for an indefinite period. *See Gonzales*, 95 N.M. at 524, 602 P.2d at 621. In another sense it might refer to employment that is terminable only for just cause. In this opinion, the term "permanent employment" is used in the latter sense and is meant to be interchangeable with "terminable for just cause." *See Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 885-90 (Mich. 1980) (discussing interpretation of the term "permanent employment").

promise to those instances in which the employee provides some consideration in addition to the services to be rendered." *Id.* at 900 (Ryan, J., specially concurring). We hold today that where there is proof of a promise sufficient to support an implied contract, the consideration sufficient to support the implied contract will be implied as a matter of law by the court whether the promise was part of the original employment agreement or was made later in modifying the employment relationship.[3]

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[3] Additional consideration may serve an evidentiary function in implied employment contracts, indicating that the parties intended to place a limitation on the employer's right to discharge, *see Pugh*, 171 Cal Rptr. at 925, but the evidentiary function is something distinct form the showing of consideration as an essential element of contract. In stating that a contract with an express or implied term restricting the employer's power to terminate need not be supported by consideration beyond the employee's service. *Pugh* quoted form *Drzewiecki v. H & R Block, Inc.*, 101 Cal Rptr. 169 (Ct.App. 1972), a case cited with approval in the earlier New Mexico Court of Appeals case of *Garza v. United Child Care, Inc.*, 88 N.M. 30, 31, 536 P.2d 1086, 1087 (Ct.App. 1975). In *Drzewiecki*, the court held the rule that should be followed in California is the one set out in *Littell v. Evening State Newspaper Co.*, 120 F.2d 36 (C.C. Cir. 1941). *Drzewiecki*, 101 Cal. Rptr at 174.

> [W]hen one who enters into a contract of employment[] promises not only that he will give his services but also additional consideration . . . such facts may be sufficient, in each case, to show the intent of the parties to enter into a contract for permanent employment.
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> . . . [W]here no . . . intent [for permanent employment not terminable except pursuant to express terms] is clearly expressed and, absent evidence which shows other consideration than a promise to render services, the assumption will be that – even

– *Mutual assent*. Paxton next challenges the verdict on the ground that there was insufficient evidence to support a finding of the contract element of mutual assent.

> though they speak in terms of "permanent" employment – the parties have in mind merely the ordinary business contract for a continuing employment, terminable at the will of either party.

Littell, 120 F.2d at 37. In addition to California, a number of courts have adopted that rationale in recent years. *See Hartman v. C.W. Travel, Inc.*, 792 F.2d 1179, 1180-81 (D.C. Cir. 1986) (explaining that presumption that employment is at will applies only when there is no evidence of parties' intent; to determine intent courts look to "such factors as the express terms of the contract, evidence of surrounding circumstances, or the payment of additional consideration"); *Eales v. Tanana Valley Medical-Surgical Group, Inc.*, 663 P.2d 958, 959-960 (Alaska 1983) (stating that the rule that contract for permanent employment is at will unless supported by additional consideration is based on an unsound foundation); *Coelho v. Posi-Seal Int'l, Inc.*, 544 A.2d 170, 176 (Conn. 1988) (adopting position that absence of additional consideration does not invalidate a contract expressing intention that employment not be terminable at will); *Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489, 492 (Ky. 1983) (joining "a number of other jurisdictions" in following the rationale of *Littel*); *Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97, 99-100 (Me. 1984) (holding parties may create employment contract terminable only pursuant to its express terms by clearly stating intention to do so); *Pine River State Bank v. Mettille*, 333 N.W. 2d 622, 629 (Minn. 1983) (holding requirement of additional consideration and presumption of at-will employment are both rule of construction rather than substance and implied contract needs no additional consideration where intention of parties is clear); *see also Eilen v. Tappin's, Inc.*, 83 A.2d 817, 818-19 (N.J. Super. Ct. Law Div. 1951) (explaining that New Jersey had never adopted the additional consideration rule and that the rule "is merely a device created by the courts to test whether or not the parties specifically and definitely intended to make such a contract").

The jury in this case as given an instruction requiring mutual assent. No objection was made to that instruction,[4] and it is, therefore, the law of this case.

We have not addressed previously the issue of mutual assent in the context of an implied employment contract. In *Kestenbaum*, this Court held, under the same instruction requiring an intention to be bound, that there was substantial evidence to support a finding that the parties agreed to a contract that permitted termination only for good cause. There was no evidence, and no requirement, to prove that the parties overtly manifested their mutual assent to the just cause term of employment. We stated that we agreed with the proposition that *oral statements made by an employer may be sufficient to create an implied contract.* See *Kestenbaum*, 108 N.M. at 24-26, 766 P.2d at 284-286. Similarly, an explicit promise would support the jury's finding of mutual assent here. Further, in *McGinnis v. Honeywell, Inc.*, 110 N.M. 1, 791 P.2d 452 (1990), we determined that the verdict finding an implied contract was supported by evidence sufficient to find an express contract, and that the theory submitted to the jury was broad enough to encompass a finding of express agreement. We then held that "the parties' conduct was sufficient to manifest an intention to be bound by the agreement." *Id.* at 5, 791 P.2d at 456. The employer there established certain policies and procedures to be followed in termination and prepared an employment agreement

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[4] The jury was instructed that it could find an implied contract if it found that "the parties by a course of conduct have shown an intention to be bound," Instruction 14, based on SCRA 1986, 13-803 (Orig. Pamp.).

stating that employment was subject to applicable personnel practices published to employees. The only evidence of the employee's asset to the policies was the signing of the agreement and that the employee commenced and continued to work. *Id.* at 2, 791 P.2d at 453. In *Forrester*, *Newberry*, and *Lukoski*, the implied contracts were based on employee manuals and the employers' courses of conduct and oral representations. In those cases, the employers issued policy statements and encouraged the employees to rely upon them. However, in each of those cases there was no evidence presented (beyond the fact that the employees commenced or continued to work) that the employees assented to the policies.

When an employer offers to restrict its power to discharge, the employee's asset to the restriction need not be evinced by anything more than commencing or continuing employment. As a matter of public policy, we see no need for any further manifestation of assent. Once the employee has successfully shown that the employer has demonstrated an intent to restrict its power to discharge, absent evidence to the contrary, the court will imply in law that the requirement of mutual assent has been met. There need be no separate factual finding of mutual assent.[5] *Accord Toussaint*, 292 N.W.2d at 892 (holding

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[5] Although in an employment contract, terms of consideration and mutual assent may be implied in law, we reiterate that an implied employment contract providing for termination only for just cause is a contract implied in fact; it is based on explicit representations or conduct. An implied-in-law contract, on the other hand, is a duty imposed by law and requires no assent. Restatement (Second) of Contracts § 4 cmt. b (1979) (using the

employer statements of policy can give rise to contractual rights without evidence of mutual agreement). In this case *if* Paxton made a sufficiently explicit offer to terminate Hartbarger only for just cause, the same evidence will support a finding of mutual assent. An employer does not have to issue a policy statement limiting its power to discharge, but if the employer chooses to do so and creates a reasonable expectation on the part of the employee, it is bound to fulfill that expectation.

To create an implied contract, the offer or promise must be sufficiently explicit to give rise to reasonable expectations. The at-will presumption that the employee has no reasonable expectation of continued employment applies only to a single term of an employment relationship – that of the employer's unabridged right to terminate the employee. *See Sheets v. Knight*, 799 P.2d 1000, 1008 n.13 (Or. 1989) (at-will employee is one who has no reasonable expectation of continued employment); *Wagenseller*, 710 P.2d at 1036

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term "quasi contract"). It is not really a contract at all. *See Hydro Conduit Corp. v. Kemble*, 110 N.M. 173, 178-79, 793 P.2d 855, 860-61 (1990) (distinguishing between contract implied in law based on obligations created by law for reasons of justice, and contract implied in fact based on parties' mutual assent as manifested by their conduct). An action for retaliatory discharge, for example, lies not as a breach of contract, but as a tort. *See Vigil v. Arzola*, 102 N.M. 682, 688, 699 P.2d 613, 619 (Ct.App. 1983) (recognizing the tort of retaliatory discharge), *rev'd in part on other grounds*, 101 N.M. 687, 687 P.2d 1038 (1984), *modified by Boudar v. E.G.&G., Inc.*, 106 N.M. 279, 280-81, 742 P.2d 491, 492-93 (1987) (allowing retroactive application), *and overruled in part on other grounds by Chavez v. Manville Prods. Corp.*, 108 N.M. 643, 649-50, 777 P.2d 371, 377-78 (1989) (lowering the burden of proof for retaliatory discharge and allowing recovery of damages for emotional distress).

(discussing exception to at-will presumption as "implied-in-fact contract *term*" (emphasis added)). The right to terminate is the only provision of an employment relationship that is challenged in a case such as the one at bar, where the employee claims that the employer promised that the employee would be discharged only for good cause. In recognizing the so-called "implied employment contract," we actually have recognized only that an implied-in-fact contract term limiting the employer's right to terminate at will may modify the underlying employment relationship.

In examining implied employment contract cases, we always have required that the *promise* claimed to have altered the presumed at-will term *be sufficiently explicit* to give rise to a reasonable expectations of termination for good cause only. Where the alleged term has arisen in a personnel manual, we have required that the manual control the employment relationship to the point that an employee could reasonably expect his employer to conform to the procedure it outlined. *Newberry*, 108 N.M. at 427, 773 P.2d at 1234. We also have stated that "if an employer does choose to issue a policy statement, in a manual or otherwise, and, by its language or by the employer's actions, encourages reliance thereon, the employer cannot be free to only selectively abide by it." *Lukoski*, 106 N.M. at 667, 748 P.2d at 510 (quoting *Leikvold v. Valley View Community Hosp.*, 688 P.2d at 170, 174 (Ariz. 1984) (*en banc*)); *see also Rowe v. Montgomery Ward & Co.*, 473 N.W.2d 268, 275 (Mich. 1991) (holding that oral statements of job security must be clear and unequivocal to overcome presumption of at-will employment). An employer creates expectations by establishing policies or

making promises. An implied contract is created only where an employer creates a reasonable expectation. The reasonableness of expectations is measured by just how definite, specific, or explicit has been the representation or conduct relied on.

The evidence in this case does not show a sufficiently explicit offer or promise to terminate only for just cause. "On appeal, we resolve all disputed facts in favor of the successful party, indulge all reasonable inferences in support of a verdict, and disregard all evidences and inferences to the contrary." *Newberry*, 108 N.M. at 428, 773 P.2d at 1235. We are to consider the totality of the parties' relationship, circumstances, and objectives in determining whether the presumption of at-will employment has been rebutted. Hartbarger has directed this Court's attention to many aspects of the parties' employment relationship, arguing that in totality they demonstrate a sufficient promise to support an implied contract. Under the challenges raised by Paxton, we look only to see if the evidence is sufficient to support a finding that Paxton, by its course of conduct, evinced an intention to discharge Hartbarger only for just cause. There is no assertion that Paxton established policies and procedures for terminations; Hartbarger relies on alleged representations that he would be fired only for just cause.

– *The yellow employee handbook.* Paxton published at least two employee handbooks, one in 1975 or 1976 with a yellow cover and one in 1983 with a red cover. Hartbarger acknowledged receiving a copy of the yellow handbook when he rejoined the company in 1977, but denied having received the red handbook. Both handbooks set out company policies regarding compensation

and reasons for discipline, outline the company's retirement plan, and contain other sections of information and advice. The evidence is sufficient to support the finding that Hartbarger received the yellow handbook and not the red handbook that contains a disclaimer stating that: "The policies in this book are subject to change. . . . They are not conditions of employment, and the language is not to be construed as a contract between [Paxton] and [its] employees. Employment is terminable at the will of either the employee or the Paxton division for which he or she works." For purposes of this appeal, we will accept the finding that only the yellow handbook affected the employment relationship between the parties. *Cf. McGinnis*, 110 N.M. at 4-5, 791 P.2d at 455-56 (holding handbook binding on employment relationship where employee had not been issued a copy but employee helped draft the guide, a copy was available in the department where she worked, employees could review guide on request, and it was published to employees in sense of having been made generally known to them and proclaimed officially by employer).

Page 10 of the yellow handbook is labeled "Fair and Square Policies." On that page are statements to the effect that Paxton will pay wages that "equal or exceed generally recognized levels prevailing in the area of employment," and that "[e]mployees will be paid and promoted commensurate with ability previously displayed and on length of service." While relating to Paxton's policy of compensation, the "Fair and Square Policies" do not relate to an implied contract requiring just cause for termination. There is no reference to termination on page

10, only general statements relating to Paxton's compensation rates.

Page 11 of the yellow handbook is labeled "Logical and Practical Rules." Near the bottom of the page is a list of "[a]ctions leading to severe disciplinary action or discharge." The list includes, inter alia: dishonesty, insubordination, excessive absenteeism, loafing after previous warnings, abuse of company property, and falsification of any company record for personal benefit. Hartbarger argues that nothing he did is encompassed by any of the categories in that list. We see no reason why the list should be deemed inclusive of all reasons for which an employee might be disciplined or terminated, or indeed, why the list should preclude discharge for no reason at all. There is no statement in the yellow handbook to the effect that the handbook reflects "established procedure regarding suspension of problem employees and termination for those who cannot conform to Company Policy," as there was in the handbook at issue in *Lukoski*, 106 N.M. at 666, 748 P.2d at 509. Neither is there anything suggesting "that the enumerated conduct was the only basis for dismissal, and the rules were consistent with a termination-at-will policy." *Rowe*, 473 N.W.2d at 275 (holding evidence insufficient to support finding of implied contract). We find that there is no language in the yellow handbook that directly or indirectly refers to a policy that Paxton will fire employees only for just cause.

– *Paxton's custom of retaining employees for a long time and Crownover's practice of usually only firing employees for a good reason.* Paxton had a history of maintaining long-term employment relationships. During the time that Hartbarger worked for Paxton, no outside salesperson

had been terminated. Crownover testified that it was not his custom and practice to go around firing people and that when he did fire someone, he usually had a good reason. Hartbarger points to this history of long-term employment and Crownover's testimony as an indication that Paxton did not maintain an at-will employment policy. Paxton responds that long-time employment is not inconsistent with an at-will policy and that it should not be penalized for not having fired employees for no reason. We agree. Paxton's retention of other employees for a long time is in itself no indication that Hartbarger had an implied contract requiring that termination be only for just cause. As a matter of policy, this Court refuses to consider evidence that a company does not usually fire employees without a good reason as any indication that the company does not maintain an at-will employment policy. To do otherwise would encourage employers to occasionally fire employees for no other reason than to show that they maintain the freedom to do so.

– *Oral statements by Crownover.* The only oral statements in evidence by any agent of Paxton are statements Crownover made when Hartbarger approached him out of concern that the family-owned Paxton Company was to be sold. Hartbarger recalled asking Crownover what would happen to the employees if the company was sold. Hartbarger testified that Crownover told him in reply that as long as he kept up his sales and took care of what he was doing he would not have anything to worry about. Hartbarger said Crownover assured him that the company was not the kind of company that would sell out and just leave its employees hanging.

Hartbarger argues that these statements could be, and on appeal should be, interpreted as meaning that he would not be terminated as long as he kept up his sales and took care of his job, i.e., unless Paxton had just cause. Because we are to consider the totality of the parties' relationship, circumstances, and objectives, we can consider the context in which this assurance was made and evaluate whether the statement was intended, or reasonably could be interpreted by Hartbarger, to be confirmation of an implied contract or a modification of the employment relationship.

The context was that a concerned employee was discussing with his supervisor what might happen to current employees if the company were to be sold. The supervisor's response to the employee's concerns was to reassure the employee. Hartbarger admitted that he was on a friendly basis with Crownover at the time, that the conversation may have been "off the record," that he knew Crownover had no authority to bind the potential new owners if the sale did occur, and that the entire conversation concerned the new owners, not the current ownership. The assurance was not expressed in terms of a contractual promise. *See Sanchez v. The New Mexican*, 106 N.M. at 79, 738 P.2d at 1324 (language of non-promissory nature and merely a declaration of employer's general approach lacks specific contractual terms which might evidence intent to form a contract).

The comments by Crownover, on their face, resemble statements made in *Toussaint* and quoted in *Kestenbaum*, 108 N.M. at 24, 766 P.2d at 284. In *Toussaint*, as in *Kestenbaum*, assurances of job security were made to the

employees during the hiring process and might legitimately have given the employee an expectation that he would not be fired without just cause. The *Toussaint* court held that an employer's statements of company policy and procedure that it will terminate only for cause can give rise to rights enforceable in contract. *See Kestenbaum*, 108 N.M. at 24-25, 766 P.2d at 284-85. In contrast, Crownover was not making a statement of current or future company policy regarding its employment relationship with Hartbarger; he was expressing an opinion as to job security if the company were to be sold.

Looking at the conversation in context, there is no reasonable interpretation of Crownover's comments that would lead one to believe that Crownover was either making a promise or reaffirming an earlier promise that Hartbarger was anything other than an at-will employee. Hartbarger's testimony cannot be construed as describing a bargaining for a change in the employment relationship between Hartbarger and the Paxton ownership at that time.

– *Written statements by Crownover.* About three months before he was fired, Hartbarger applied for a loan. The lender asked Crownover to fill out a verification of employment form in connection with the loan approval process. Crownover stated on the form that Hartbarger's probability of continued employment was "excellent" and that Hartbarger was "likely" to continue to receive overtime or bonus pay, by which Crownover said he meant commissions. Hartbarger points to the verification statement as indicative of an implied contract requiring just cause of termination. We disagree.

The statements were made to the lender, not to Hartbarger, and clearly could not indicate a modification of the employment relationship. The comments made were the same as might be given for an at-will employee who has been with the company a long time and has been a steady employee. They are not indicative of a modified employment relationship. The comments are no indication that Hartbarger could be terminated only for just cause. They indicate only that, at that time, Crownover did not contemplate firing Hartbarger and thought that he would continue to receive bonuses in the form of commissions. *See Rowe*, 473 N.W.2d at 273 (orally grounded contractual obligation for permanent employment " 'must be based on *more than* an expression of an optimistic hope of a long relationship' ") (emphasis added in *Rowe*) (quoting *Carpenter v. American Excelsior Co.*, 650 F.Supp. 933, 936 n.6 (E.D. Mich. 1987))).

The other written statement that Hartbarger points to as evidence of an implied contract is the evaluation form that was given to Hartbarger at the meeting where Hartbarger was terminated. That written statement cannot be construed as modifying the employment contract or any an indication of an implied contract because it contains no statements regarding future employment conditions and was not given to Hartbarger until the meeting that concluded with his termination.

– *Paxton's retirement plan.* Pages 20 and 21 of the yellow handbook give a brief description of the employee retirement program that was in place at the time. On page 20, the handbook points out that Paxton "will vigorously resist pension claims presented by any employee

involved in theft, conversion or embezzlement of company property." On page 21 there is a paragraph providing that employees who are vested in the pension plan may be entitled to receive their retirement benefits from the Paxton plan at their normal retirement date. Benefits claimed in that manner are subject to forfeiture if the employee was "discharge[d] for theft of company property." There are no references in the retirement program to discharge for any other reason or for voluntary separation.

Hartbarger argues that the retirement plan's policy of contesting benefits if the employee was involved in theft from the company is contra-indicative of an at-will employment policy. We see nothing in the retirement plan that supports Hartbarger's position. The statement that Paxton will contest retirement benefits if termination was for theft of company property is no indication that employees will not be terminated for other reasons. The statement only indicates that a termination for any other reason will not result in a contest of accrued retirement benefits, and that position is consistent with an at-will termination policy.

Totality of the evidence insufficient to support a finding of a promise that employment could be terminated only for just cause. Viewing all of the circumstances of this employment relationship, we hold that the evidence was not sufficient to support a finding that Paxton made an offer or promise sufficiently explicit to support a finding of an implied contract. There was no representation sufficiently explicit to constitute an offer not to terminate Hartbarger except for just cause, thus there could be no implied contract to that effect. Therefore, we reverse the judgment

against Paxton and remand with instructions to enter judgment in Paxton's favor.

IT IS SO ORDERED.

/S/ RICHARD E. RANSOM, Chief Justice.

WE CONCUR:

/s/ Seth D. Montgomery, Justice

/s/ Gene E. Franchini, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

July 21, 1993

NO. 19,913

BILL HARTBARGER,

Plaintiff-Appellee,

vs.

FRANK PAXTON COMPANY,

Defendant-Appellant.

This matter coming on for consideration by the Court upon appellees's motion for rehearing, and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the motion for rehearing is DENIED. For clarification in response to the motion for rehearing, the opinion filed June 14, 1993 is amended by interlineation at page 8, lines 6 and 19, at page 9, lines 8-11, and at page 11, line 17, along with several grammatical corrections.

ATTEST: A TRUE COPY

/s/ Kathleen Jo Gibson
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

BILL HARTBARGER,

Plaintiff-Appellee,

vs. No. 19,913

FRANK PAXTON COMPANY,

Defendant-Appellant.

APPEAL FROM
THE DISTRICT COURT OF BERNALILLO COUNTY
Philip R. Ashby, District Judge

Albert N. Thiel, Jr.
Albuquerque, NM for Appellant

Jeffrey Romero
Albuquerque, NM for Appellee

ORDER

(Filed Sept. 15, 1993)

The opinion filed June 14, 1993, Vol. 32, No. 33, SBB 635, is amended by interlineation in the penultimate sentence of the paragraph captioned, "Paxton's custom of retaining employees for a long time and Crownover's practice of usually only firing employees for a good reason," to read: "As a matter of policy, this Court will not consider evidence that a company does not usually fire employees without a good reason as *by itself* establishing that the company does not maintain an at-will employment policy.

ATTEST: A TRUE COPY

/s/ Kathleen Jo Gibson
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

September 16, 1993

NO. 19,913

BILL HARTBARGER,

Plaintiff-Appellee,

vs.

FRANK PAXTON COMPANY,

Defendant-Appellant.

This matter coming on for consideration by the Court upon appellee's motion for reconsideration and rehearing and brief in support of said motion, and the Court having considered the motion and brief, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the motion is DENIED.

ATTEST: A TRUE COPY

/s/ Kathleen Jo Gibson
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

October 4, 1993

NO. 19,913

BILL HARTBARGER,

Plaintiff-Appellee,

vs.

FRANK PAXTON COMPANY,

Defendant-Appellant.

This matter coming on for consideration by the Court upon appellee's third motion for rehearing, and the Court having considered the motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the motion is DENIED.

ATTEST: A TRUE COPY

/s/ Kathleen Jo Gibson
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

BILL HARTBARGER,

Plaintiff/Appellee,

vs. No. 19,913

FRANK PAXTON LUMBER COMPANY,

Defendant/Appellant.

PLAINTIFF/APPELLEE'S MOTION FOR REHEARING

COMES NOW the Plaintiff/Appellee in the above-referenced cause, and pursuant to Rule 12-404 S.C.R.A. 1978, as amended, respectfully moves this Court for a rehearing in the above-entitled cause. As grounds for this Motion, Plaintiff/Appellee states:

1. This Court's opinion was filed on June 14, 1993.

2. This Court overlooked and misapprehended the law in this case as follows:

a. The Court's new public policy statement on page 11 of the opinion that "As a matter of policy, this Court refuses to consider evidence that a company does not usually fire employees without a good reason as any indication that the company does not maintain an at will employment policy," is directly contrary to *Kestenbaum v. Pennzoil Co.* which upheld a jury verdict establishing an implied employment contract through evidence of the employer's course of conduct.

b. The Court misinterpreted and misapplied a Michigan opinion, *Rowe v. Montgomery Ward & Co., Inc.*

473 N.W. 2d, 268 (Mich. 1991), to the present case, disregarding established New Mexico law.

c. The Court's opinion substituted the requirement that the employer's promise must be "explicit" for the New Mexico requirement that the promise contained "specific contractual terms."

3. The Court re-weighed the evidence and failed to indulge all reasonable inferences in favor of the prevailing party, the Plaintiff.

Plaintiff therefore requests that in view of the above, this Court withdraw its opinion of June 14, 1993 in this case and affirm the judgment. In the alternative, Plaintiff requests this Court to remand this case for a new trial, with an appropriate instruction consistent with the Court's new rulings on the law herein.

Respectfully submitted,

JEFF ROMERO
Attorney for Plaintiff/Appellee
804 Fifth Street NW
Albuquerque, NM 87102
(505) 242-9000

I hereby certify that a true
and correct copy of the foregoing
was mailed to opposing counsel
this 25th day of June, 1993.

JEFF ROMERO

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

BILL HARTBARGER,

Plaintiff/Appellee,

vs. No. 19,913

FRANK PAXTON LUMBER COMPANY,

Defendant/Appellant.

PLAINTIFF/APPELLEE'S BRIEF IN SUPPORT OF MOTION FOR REHEARING

The opinion issued by the Court on June 14, 1993, hereinafter *Hartbarger* opinion, was shocking and represents a miscarriage of justice.[1] This Court has told a man, who has given most of his working life to a company which arbitrarily fired him, that, despite a favorable verdict by a jury of his peers, he has no legal remedy. The Court arbitrarily overturned the unanimous verdict of a six person jury. The Court did *not* find error in the trial, the Court's ruling on the evidence, the instructions given to the jury or the conduct of the parties or counsel. Rather, the Court substituted its own judgment for that of the jury, usurped the function of the jury, reweighed the evidence including the testimony of witnesses at trial, and went out of its way to find in favor of the Defendant, Paxton Lumber Company. In so doing, the Court improperly interpreted facts in favor of the Defendant, rather than in favor of the Plaintiff, the prevailing party. In the

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[1] As this court stated *Boudar v. E.G. & G., Inc.*, 106 N.M. 279, 281 742 P.2d 491, 494 (1987): "[O]ur decisions must be final because they are right, and not right because they are final . . . "

process of its re-trial of the *Hartbarger* case, the Court has also gutted the law of implied employment contracts in the State of New Mexico, as it has heretofore existed.

The *Hartbarger* opinion is contrary to existing New Mexico law in two important respects, (1) the Court announced a *new* policy that it refuses to consider evidence that a company does not usually fire employees without a good reason as any indication that the company does not maintain an "at will" employment policy. This is directly contrary to the opinion of this Court in *Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 766 P.2d 280 (1989). (2) The opinion in this case substituted the requirement that an employer's promise must be "explicit" for the New Mexico requirement concerning "specific contractual terms." *Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 773 P.2d 1231 (1989).

It is important to remember that New Mexico law has established that employers cannot raise reasonable expectations on the part of their employees and then arbitrarily retreat to the traditional presumption of "at will" employment when the going gets rough. *Kestenbaum; Lukoski v. Sandia Indian Management*, 106 N.M. 664, 748 P.2d 507 (1988). *Kestenbaum* and *Lukoski* recognize the realities of the relationship between employer and employee in the market place. The *Hartbarger* opinion represents a retreat into the world of legalism and obfuscation. To hold that in today's complex workplace where manuals have become necessary to regulate the work relationship, that such manuals do not create a reasonable expectation in the employee that his work relationship with his employer has changed, and to hold

instead that he must extract explicit contractual provisions, where the employer could easily preserve his rights by writing "at will" in the manual, places an undue burden on the employee. *Kestenbaum* and *Lukoski* recognize this. The *Hartbarger* opinion unjustly denies it.

A. The Court's new "policy" on course of conduct evidence.

On page 11, the Court states:

> Paxton's retention of other employees for a long time is in itself no indication that Hartbarger had an implied contract requiring that termination be only for just cause. *As a matter of policy, this Court refuses to consider evidence that a company does not usually fire employees without a good reason as any indication that the company does not maintain an at-will employment policy.* To do otherwise, would encourage employers to occasionally fire employees for no other reason than to show that they maintain the freedom to do so.

Hartbarger opinion p. 11 (emphasis added).

In making this new policy, the Court misapprehends the facts of the *Hartbarger* case and ignores existing case law. The Court confuses two separate facts in this case: 1) Plaintiff and others maintained long-term employment with Defendant; and 2) the Defendant had a custom and practice of termination only for just cause. In this case, there was evidence of a practice of long term employment of employees. Separately however, there was also evidence that the company maintained a practice of terminations only for just cause. The Defendant Alan Crownover testified as follows:

Q: And what you meant by "at-will" was that you could terminate them for any reason.

A: Or a reason, yes.

Q: A reason? Or even a bad reason?

A: I always try to have a good reason whenever we had to terminate someone.

Q: You never made it a habit of terminating people for no good reason?

A: Depends on how you would want to look at that.

Q: Did you always have a good reason or did you not have a good reason?

A: Usually.

Transcript Vol. VI pp. 118-119.

There was no evidence presented that the company maintained a fire "at will" custom or practice. There was nothing in the employment manual which indicated that people could be terminated for no cause, or that they were "at will" employees.

However, the court now states, in contrast to this Court's opinion in *Kestenbaum*, that the Court will refuse to consider course of conduct evidence as any indication that the company does not maintain an "at will" employment policy. This is contrary to the opinion in *Kestenbaum*, wherein this Court stated:

> *Kestenbaum* presented the following evidence to establish that his employment contract was for an indefinite period of time and allowed involuntary removal only for a good reason.

. . .

> Mr. Wolfe, Operations Manager at Vermejo Park testified that Pennzoil only released permanent employees for "a good reason, a just cause." Mr. Lew, an investigator stated that he presumed that Pennzoil only terminated employees for just cause. Vice-President Rundle confirmed this policy, as did Mr. Charlesworth, Kestenbaum's successor supervisor, who testified that Pennzoil believed it had to "have a good reason to terminate an employee" and that the Houston office always required good cause. *Pennzoil presented no evidence that it maintained a "fire at will" management practice.*
>
> . . .
>
> . . . However, when coupled with uncontroverted testimony describing the negotiations between Kestenbaum and Pennzoil's agent, and *with Pennzoil's concession that there was a management practice followed by Pennzoil not to terminate employment except for good reason*, there is substantial evidence to support the jury finding that an implied employment provision for discharge only for a good reason was in effect between Pennzoil and Kestenbaum.

108 N.M. at 25-26, (emphasis added).

The fact that the Paxton Company did not maintain a fire "at will" policy, and that no one was ever fired without just cause, was supplemented with evidence that Paxton Company had many long-term employees. TR Vol. VI p. 79.[2] Even if this Court does not consider the failure

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[2] *Hartbarger* stated at p. 11 that "Paxton's retention of other employees for a long time is *in itself* no indication that

to fire people on a regular basis as evidence that the employer had no "at will" policy, *it must* consider the evidence that Paxton had a practice of firing only for good cause. This is appropriate course of conduct evidence under *Kestenbaum*.

In effect, this Court has overruled a specific holding in *Kestenbaum*, that the court should, could and did consider evidence that the employer did not maintain a fire "at will" management practice. It is improper to overrule existing case law without remanding the case for a new trial on the newly enumerated legal standard. The failure to provide for a remand on this case is a violation of due process. *Budagher v. Amrap, Corp.*, 97 N.M. 116, 637 P.2d 547 (1981). (Supreme Court's promulgation of a jury instruction establishing new law in New Mexico requires remand for a new trial); *Construction, Contracting & Management Inc. v. McConnell*, 112 N.M. 371, 815 P.2d 1161 (1991) (Supreme Court's holding establishing new law of damages for breach of construction contract required a remand for a new trial under revised jury instructions).

This Court also nullified the holding in *Lukoski*, in which the court stated:

> Whether an employee handbook has modified the employment relationship is a question of fact "to be discerned from the totality of the circumstances' statements and actions regarding the employment relationship. . . ."

Hartbarger had an implied contract requiring that termination be only for just cause." (emphasis added). This evidence must be considered together with the totality of the circumstances and the context of the evidence. *Kestenbaum*.

> Evidence relevant to this factual decision includes the language used in the personnel manual as well as the employer's *course of conduct* and oral representations regarding it.

106 N.M. at 666 (emphasis added). What the Court has said in the *Hartbarger* opinion is that an employer's course of conduct in firing people for only good cause cannot be considered any longer, as a matter of Supreme Court policy. This Court, however, has failed to specifically overrule *Lukoski* on this point, or to remand this case for a trial on its new standard.

The Court also failed to overrule *Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 773 P.2d 1231 (1989), in which this Court, again, reiterated that conduct of the parties as well as the employment manual (which listed grounds for disciplinary actions ranging from warning to immediate dismissal), were sufficient evidence to give rise to an implied contract of employment. The *Newberry* court stated:

> In line with *Forrester*, *Lukoski*, and *Kestenbaum*, we hold there is substantial evidence in the instant case to support the jury's finding of an implied contract of employment between Newberry and T-Bird permitting termination only for good cause.
>
> In the case at bar, the Court instructed the jury on the applicable law of employment contracts as follows:
>
> > An implied contract is an agreement in which the parties by a *course of conduct* have shown an intention to be bound by such agreement. S.C.R.A. 1986, 13-803 (emphasis added).

Thus, to find an implied contract of employment, the jury was to consider evidence of all the parties' *conduct*, including their words and the policy manual. Newberry testified that when he took the job with T-Bird, he understood he would have a great future there; during his training as a manager, he was told that the company policy manual was "his Bible" which he had to follow. Evidence indicated that this policy manual applied to hourly and salaried employees, and the employees understood that termination from their jobs would be only for good reason. Although the manual covered a variety of personnel-type matters, it also included a section on termination, as well as one on rules and regulation the violation of which was "sufficient grounds for disciplinary actions ranging from a warning to immediate dismissal." The section on involuntary termination states:

> "To be discharged as the result of rule infractions, poor performance, or other 'cause' is a situation you and only you can control you and only you can control [sic]."

This statement suggests that it was T-Bird's policy not to terminate employment except for good reason. Based on the totality of the parties' relationship and surrounding circumstances, it is clear that the manual controlled the employer-employee relationship and that Newberry could expect T-Bird to conform to the procedures in the policy guide. The manual, words and conduct of the parties here give rise to an implied contract of employment.

Newberry, 108 N.M. at 428, (emphasis added).

The evidence in this case was of a similar nature. The "Getting Acquainted" manual listed grounds for discharge. See Exhibit 14, p. 11 listing twelve grounds "leading to severe disciplinary action or discharge." The statements of the employer that he always tried to have a good reason for discharge, and that Paxton usually had good cause to terminate, is sufficient evidence of a course of conduct which gives rise to an implied contract of employment. *Newberry*. However, the *Hartbarger* opinion states that conduct such as failing to fire individuals without good cause is not sufficient. The Court has not explicitly but "impliedly" overruled *Newberry*.

Finally, the "chamber of horrors" argument that employers would fire workers "to show that they maintain the freedom to do so" is not applicable to *Hartbarger*. Unlike *Kestenbaum*, *Hartbarger* involved an employee manual. It is well established New Mexico law that an express provision in an employment manual will preserve the "at will" employment presumption. *Chavez v. Manville Products, Corp.*, 108 N.M. 643, 777 P.2d 371 (1989). All the employer need do is to put such a provision into its employee manual and the "at will" employment presumption is preserved. There is no need to periodically fire employees without cause as a matter of principal as suggested by the *Hartbarger* opinion at p. 11.

B. The Substitution of "explicit" for "specific contractual terms"

This Court has also changed the law as it existed prior to *Hartbarger*, by requiring an offer or promise to be explicit. *Hartbarger* Opinion p. 8 In New Mexico, prior to

Hartbarger, this Court required only that a handbook contain "specific contractual terms" which might evidence an intent to form a contract. *Sanchez v. New Mexican*, 106 N.M. 76, 79, 738 P.2d 1321, 1324 (1987); *Newberry*, 108 N.M. at 426-427, 773 P.2d at 1234. The standard has been "specific contractual terms" not an "explicit offer" by the employer.

In the *Hartbarger* case, there were "specific contractual terms." Page 11 of the employment manual listed twelve grounds for disciplinary action or discharge. It states as follows:

> Activities leading to severe disciplinary action or discharge are:
>
> a. Dishonesty or failure to report theft or any other crime.
>
> b. Insubordination.
>
> c. Carelessness in product handling.
>
> d. Excessive absenteeism.
>
> e. Drunkenness, liquor on premises or on breath; use of prohibited drugs or narcotics.
>
> f. Loafing after previous warning.
>
> g. Violating safety rules, thus endangering safety of others.
>
> h. Abuse or destruction of company property.
>
> i. Health and sanitation violations.
>
> j. Vulgarity or habitual cursing.
>
> k. Repeated accident or mistake pattern.
>
> l. Falsifying any company record for personal benefit.

This is specific contractual language. This language tells an employee that if he commits these certain infractions or acts, he will be disciplined or discharged. It is not a vague statement of company policy or corporate culture. There are consequences for not meeting the listed conditions of employment. This is a specific contractual term.

In requiring an offer or promise to be explicit, this Court relied heavily on a Michigan case, *Rowe v. Montgomery Ward & Co. Inc.*, 473 N.W.2d 278, 275 (Mich. 1991). That case held that "an employee, who seeks to establish from *conduct* a promise implied in fact, must meet a higher standard than an employee who relies on express language." *Rowe*, 473 N.W.2d at 275. Because the employee has a higher standard of proof than other contracting parties, "*oral* statements of job security, must be clear and unequivocal to overcome the presumption of employment at-will." *Rowe*, 473 N.W.2d at 275. This is an entirely different standard than the simple requirement of "specific contractual terms" in *Lukoski*. In the *Hartbarger* opinion this Court has mistakenly interpreted *Rowe* to set forth a totally new standard of an "explicit offer," not found in either *Lukoski* (which required "specific contractual terms") or *Rowe* (which required the special higher standard of "clear and unequivocal" for employment contracts).

In *Rowe*, the plaintiff argued that she could only be fired for failure to meet her sales quota. 473 N.W.2d at 270. This testimony was clearly contradicted by the "rules of personal conduct" and which indicated various other grounds for discharge such as theft, destruction of property, falsification of records, and moral impropriety.

Plaintiff in *Rowe* even signed a specific agreement to abide by these rules. 473 N.W. 2d at 275. Furthermore, the *Rowe* court was not even considering the specificity of the language in the personnel manual in that part of the court's decision. The court determined that the *oral* representations of defendant employer were not explicit enough to form a contract. As indicated above, statements in the employment manual in *Hartbarger* of "Actions leading to severe disciplinary action or discharge are:" is clearly contractual language. Plaintiff Hartbarger is not asserting that the employer made oral representations contrary to these specific contractual terms. What is even more significant was that the court in *Rowe* ultimately concluded that plaintiff could not maintain the action because the last handbook plaintiff received clearly set forth an employment "at will" policy. 473 N.W. 2d at 276.

As indicated above, in *Hartbarger*, there were no oral representations different from the manual, as was the issue in *Rowe*. Nonetheless, in *Hartbarger*, this Court held, in interpreting *Rowe*, that the provisions of a discharge for specific cause will not preclude the concurrent operation of employment "at will." In *Hartbarger*, the jury found that a reasonable employee would not interpret the manual to mean a concurrent policy of discharge for specific cause and a discharge at will. In other words, a reasonable employee would presume that if the employer could discharge him for no cause, the employer would not bother to hand him a handbook with a list of specific grounds for discharge. This Court has given no authority for holding that this is not a reasonable position for the jury to take.

Before the Court's opinion in this case, a manual was not even necessary to create an implied contract of employment if there was evidence that the employer "allowed involuntary removal only for a good reason." *Kestenbaum*, 108 N.M. at 25, 766 P.2d at 285 (1988). This evidence could be in the form of assurances, course of conduct and long-term employment benefits. *Id.*

This Court, in its opinion, has now held that an "explicit" promise or offer is required, simply ignoring the holding in *Kestenbaum* that an implied contract can exist even without handbooks or manuals. The Court has abruptly and without notice to the parties, abandoned its previous holding that an employment manual is not the only piece of evidence which will be considered in determining the existence of a contract or its terms. *Kestenbaum*, 108 N.M. at 24.

In *Lukoski*, an employee manual case, the issue of whether the employment manual controlled the employment relationship was a question of fact for the jury. *Lukoski*, 106 N.M. at 666. However, the *Hartbarger* opinion would remove that issue of fact from the jury. This Court stated in *Hartbarger*, supposedly following *Rowe*, that as a matter of law, the enumeration of specific causes for discharge cannot be read, so as to preclude a concurrent employment "at will." However, this is not what was held in *Rowe*. What *Rowe* actually held, was that the specific causes of discharge were contradicted by the employer's oral representation that the only factor in continued employment was meeting the sales quota. *Rowe*, 473 N.W. 2d at 275. This has nothing to do with the *Hartbarger* facts.

C. Usurpation of the role of the jury or fact finder.

The existence of an implied contract of employment an [sic] its terms are issues of fact for the jury to decide. *Boudar v. E.G. & G., Inc.*, 106 N.M. 279, 742 P.2d 491 (1987). As indicated in *Lukoski, supra*, whether an employment manual has modified the at-will employment relationship "is a question of fact." 106 NM at 666. "Evidence relevant to this factual decision includes the language used in the personnel manual as well at [sic] the employer's course of conduct and oral representations regarding it." *Id.*

In essence, this Court has re-weighed the trial evidence in this case, usurping the function of the jury. On appeal of a trial court judgment, the Supreme Court must resolve all disputed facts in favor of the successful party, indulge all reasonable inferences in support of the verdict, and disregard all evidence and inferences to the contrary. Evidence is not re-weighed. *Clovis National Bank v. Harmon*, 102 NM 166, 692 P.2d 1315 (1984); *Newberry v. Allied Stores, Inc.*, 108 NM 424, 428, 773 P.2d 1231 (1989).

The *Hartbarger* opinion usurped the function of the jury and re-weighed the evidence. (1) The Court determined that the jury could not find the existence of implied employment contract. (2) The Court premised its decision on the requirement of explicitness in the offer or promise. (3) The Court, without citing authority, stated: "to create a reasonable expectation that the employer's right to discharge is restricted, the statement or policy must be explicit." *Hartbarger* opinion at p. 9. Again the Court fails to cite any authority for this proposition. The Court however, in the sentence preceding the above

quoted portion, stated: "An implied contract is created only where the employer creates a reasonable expectation." The Court thus stated that the only way to create a reasonable expectation is through extracting an "explicit" promise from the employer. If the promise was "explicit" and the employee accepted the employer's offer, there is an express contract and there is no need to find reliance or reasonable expectations.

Reasonable expectations can be created by employment manuals listing grounds for discharge even if the grounds are not all inclusive. An average reasonable person reading the "Getting Acquainted" manual would reasonably conclude that the grounds listed for discipline or discharge on page 11 were the reasons that a person could be discharged. At the very least, a reasonable man would conclude that these were good reasons for discharge, and would thus reasonably infer that a good reason was required for discharge especially when there was nothing in the personnel manual which cautioned against relying on such a conclusion. The reasonable employee, after reading the "Getting Acquainted" manual would infer that he would be fired for some reason, not *no* reason. See *Kestenbaum* and *Lukoski, supra*. If the employer wanted to preserve his "at will" employment rights, he need only add a provision warning the employee that the list of "for cause" grounds for firing did not abrogate his "at will" status. It is only fair to the employee to make this clear. Otherwise, the employee does not know where he stands.

A "reasonable expectation" creating an implied contract can also be created by the conduct of the employer in firing people only for good cause. See *Kestenbaum*.

Likewise, the oral statements by Crownover that as long as Plaintiff kept his sales up, Hartbarger would have nothing to worry about, even though made in the context of another company's take over, implied that the new company's policy should be similar to that of Paxton of not firing people unless there was a good reason.[3] This, coupled with statements that Paxton was like a family, Hartbarger's testimony that once you started working there you were like a lifer and Exhibit 38, which referred to a policy of Paxton of insuring employment for a lifetime, all gave rise to a reasonable expectation by Bill Hartbarger and a reasonable conclusion by the jury, that good cause was needed for termination. The same facts considered by the Supreme Court in its opinion in this case were considered by the jury.

This Court improperly weighed the evidence when it stated that there was no language which directly or *indirectly* refers to a policy of discharge only for just cause. See *Hartbarger* p. 11, line 5. The jury found that a policy of just cause discharge was *implied* in the language in the handbook and gave rise to a reasonable expectation. Reasonable expectations can be created by other than explicit promises or policies.

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[3] Other courts have upheld implied contracts of employment based on employer assurances in the face of crises such as assurances made to persuade employees to vote against a labor union organization campaign. *See, Kinoshita v. Canadian Pacific Airlines*, 724 P.2d 110, 117 (Hawaii 1986).

Even so, there is evidence of an explicit policy of discharge for good cause. The grounds for discharge listed on page 11 of the employment manual refer to "Logical and Practical Rules." These are not suggestions or desires, they are "Rules." "Actions leading to severe disciplinary action or discharge" include no less than twelve specific items. This alone should constitute the explicitness which the Court is [sic] required in the *Hartbarger* opinion.

The Court's requirement of explicitness is the antithesis of an implied contract. An implied contract means that the agreement, or its terms, are *not* expressed. Explicitness means that they are express. By requiring explicitness the Court has basically gutted the law of implied contracts in New Mexico. If an offer or promise is explicit, there is an *express* contract.

This opinion should be revised to rule in favor of Plaintiff in this case based upon substantial evidence in the record, or alternatively, the case should be remanded for a new trial. It has been held in New Mexico that where it cannot be determined whether a jury's verdict was based upon an improperly submitted issue, a new trial *must* be granted. *McNeely v. Henry*, 100 N.M. 794, 676 P.2d, 1359 (Ct.App. 1984).

In this case it is clear that this Court has changed the law regarding implied contract in New Mexico by requiring an offer or promise to be explicit and by rejecting course of conduct evidence. This was not the law as it existed at the time this case was tried. At the very least, this Court should give Plaintiff the opportunity to try his case based on the new law as declared by this Court.

Budagher; Construction, Contracting & Management, Inc., Plaintiff alternatively requests this Court to remand this cause for a new trial with appropriate instructions regarding the explicitness of the offer or promise. See also, *Rose v. Grisolano*, 56 N.M. 25, 239 P.2d, 719, (1952).

The existence of a contract and its terms are issues for the jury to decide and the jury verdict should be upheld. *Boudar, supra.*

WHEREFORE, Plaintiff respectfully requests this Court, to reconsider its Opinion of June 14, 1993, to affirm the judgment, or, in the alternative to remand this case for a new trial with appropriate instructions based upon the new principles of law announced in its decision.

Respectfully submitted,

JEFF ROMERO
Attorney for Plaintiff/Appellee
804 Fifth Street NW
Albuquerque, NM 87102
(505) 242-9000

I hereby certify that a true
and correct copy of the foregoing
was mailed to opposing counsel on
this 25th day of June, 1993.

JEFF ROMERO

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

BILL HARTBARGER,

Plaintiff/Appellee,

vs. No. 19,913

FRANK PAXTON LUMBER COMPANY,

Defendant/Appellant.

ADDENDUM TO PLAINTIFF/APPELLEE'S BRIEF IN SUPPORT OF MOTION FOR REHEARING

(Filed June 29, 1993)

COMES NOW the Plaintiff/Appellee in the above-referenced cause and hereby submits the following addendum to Plaintiff/Appellee's Brief in Support of Motion for Rehearing. Plaintiff/Appellee attaches the following language to the first full paragraph on Page 4 of Plaintiff/Appellee's Brief in Support of Motion for Rehearing. The portions added are in bold type:

There was no evidence presented that the company maintained a fire "at will" custom or practice. There was nothing in the employment manual which indicated that people could be terminated for no cause or that they were "at will" employees. **On the contrary, there exists substantial course of conduct evidence in addition to the above testimony of Defendant Alan Crownover which evidenced a company practice of terminating for cause only. Crownover testified that he terminated Plaintiff because Plaintiff refused to accept Crownover's decision to reduce his commission, a decision which Crownover could have made without Plaintiff's approval. Transcript Vol. VI p. 77. Crownover felt that**

he was required to have a reason to terminate Plaintiff, as clearly evidenced by the numerous reasons (even though they conflicted) listed by Crownover in the various exhibits introduced at trial in the above cause:

a. Employment Evaluation - Ex. 23

b. Correspondence from Alan Crownover to the New Mexico Employment Security Department dated 3/17/87, 5/20/87 and 06/03/87 - Ex. 26

c. Defendant's Answers to Plaintiff's First Set of Interrogatories - Ex. 31

d. Affidavit of Alan Crownover - Ex. 32

e. Paxton Crownover Response to Hartbarger EEOC Complaint 09/28/87 - Ex. 30

f. Al Thiel's Response to EEOC 1/22/88 - Ex. 65

g. Crownover's admission of his deposition testimony, Transcript Vol. VI pp. 109-110.

In each of these exhibits Defendant Crownover goes to some length to explain his cause for terminating Plaintiff. If he felt he needed no cause or that cause was required, he need not have listed any reason for his termination. See Argument contained on pp. 26-31 of Plaintiff/Appellee's Answer Brief. Defendant Crownover also admitted that he had fired individuals for insubordination (Transcript Vol. VII p. 33) which is obviously a good reason. This course of conduct

evidence should be considered by the Court. *Kestenbaum* and *Lukoski*.

Respectfully submitted,

JEFF ROMERO
Attorney for Plaintiff/Appellee
804 Fifth Street NW
Albuquerque, NM 87102
(505) 242-9000

I hereby certify that a true
and correct copy of the foregoing
was mailed to opposing counsel on
this 29th day of June, 1993.

JEFF ROMERO

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

BILL HARTBARGER,

Plaintiff/Appellee,

vs. No. 19,913

FRANK PAXTON LUMBER COMPANY,

Defendant/Appellant.

PLAINTIFF/APPELLEE'S MOTION FOR RECONSIDERATION AND REHEARING

(Filed Aug. 5, 1993)

COMES NOW the Plaintiff/Appellee in the above-referenced cause, pursuant to SCRA 1986 12-404, as amended, and respectfully moves the Court for a reconsideration of its denial of Plaintiff/Appellee's Motion for Rehearing in the above-entitled cause. As grounds for this motion, Plaintiff/Appellee states:

1. This Court's Opinion was filed on June 14, 1993.

2. By motion and supporting memorandum filed June 25, 1993, and by addendum filed June 29, 1993, Plaintiff/Appellee moved this Court for a rehearing of its decision of June 14, 1993.

3. On July 21, 1993, this Court denied Plaintiff/Appellee's Motion for Rehearing, but this Court modified its disposition as follows:

A. At page 8, lines 6, 7 and 18 through 20 this Court rephrased its previous absolute requirement of explicitness to a flexible requirement of sufficient explicitness.

B. At page 9, lines 8 through 11, the Court has now established a new test for reasonableness of

expectation in the creation of an implied contract of employment.

C. The Court at page 11 of its opinion, lines 17 through 19, stated that evidence that a company does not usually fire employees without a good cause does not *establish* that the company does not maintain at-will employment policy.

4. No jury instruction was given to the jury by the trial court regarding the test for reasonableness of expectations because this Court had not previously established a test for reasonableness of expectation in implied contracts. Neither were the issues raised in the motion for directed verdict as required by SCRA 1986, 1-050(A).

5. Plaintiff/Appellee did tender sufficient evidence of the reasonableness of his expectations for the issue to be sent to the jury. See Plaintiff/Appellee's Brief in Support of Motion for Reconsideration and Rehearing.

6. This case should therefore be remanded for a new trial with the opportunity for Plaintiff/Appellee and Defendant/Appellant to tender and the trial court to give appropriate instructions consistent with this Court's Opinion.

7. A remand is required by the New Mexico Constitution, Article II, Section 12, SCRA 1986, 1-050(A) and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

8. The Court in its original and modified Opinion continues to recognize (at page 4, footnote 2) that the term "permanent employment" is used in the sense that it is employment "terminable only for just cause." In this case there was sufficient evidence to indicate Plaintiff/

Appellee had a contract for "permanent employment", and thus Plaintiff's employment was terminable only for just cause. See Plaintiff/Appellee's original Response Brief filed on January 16, 1992.

WHEREFORE Plaintiff/Appellee prays the Court to withdraw its opinion of July 21, 1993, and affirm the Judgment in this cause. In the alternative, Plaintiff/Appellee requests this Court to remand for a new trial consistent with the due process requirements of the Fourteenth Amendment to the United States Constitution and with an appropriate instruction consistent with this Court's new rulings on the law herein.

Respectfully submitted,

JEFF ROMERO
Attorney for Plaintiff/Appellee
804 Fifth Street NW
Albuquerque, NM 87102
(505) 242-9000

I hereby certify that a true
and correct copy of the foregoing
was mailed to opposing counsel on
this 5th day of August, 1993.

JEFF ROMERO

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

BILL HARTBARGER,

Plaintiff/Appellee,

vs. No. 19,913

FRANK PAXTON LUMBER COMPANY,

Defendant/Appellant.

PLAINTIFF/APPELLEE'S BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION AND REHEARING

(Filed Aug. 5, 1993)

A. Motion for Reconsideration is proper.

The Opinion issued by the Court on July 21, 1993, modifies the Court's original Opinion of June 14, 1993, in certain significant respects. Because the Court has modified its Opinion, this Motion for Reconsideration and Rehearing is proper pursuant to Rule 12-404, SCRA 1986 which states as follows:

> A. Motion when filed. A motion for rehearing may be filed within fifteen (15) days after filing of the appellate court's disposition, or *any subsequent modification of its disposition,* unless the time is shortened or enlarged by order. (Emphasis added).

This Court has modified its opinions in the past in this regard. In *Boudar v. E.G. & G., Inc.*, 106 N.M. 279, 742 P.2d 791 (1987), this Court had originally denied Plaintiff/Appellee's Motion for Rehearing. Plaintiff filed a Motion for Reconsideration fourteen (14) days after this

Court had denied his original Motion for Rehearing seeking another determination of the issues he had raised on appeal. The Court, then after further consideration, reconsidered its original Opinion, and withdrew it, substituting its new opinion. In responding to E.G. & G.'s arguments that plaintiff/appellee's motion for reconsideration would open flood gates of endless post-appeal motions, Justice Sosa eloquently stated:

> Our decisions must be final because they are right, and not right because they are final, even if we must take the untoward action of acknowledging our incorrect limitation of the issues presented to us on previous rehearing.

742 P.2d at 493-494. See also *Central Adjustment Bureau, Inc. v. Thevnet*, 101 N.M. 612, 686 P.2d 954 (1984).

B. Changes at Page 8.

At page 8 lines 6 and 7 of the Court's July 21, 1993 Opinion, the Court stated:

> To create an implied contract, the offer or promise must be *sufficiently explicit* to give rise to *reasonable expectations.* (Emphasis added)

In its original June 14, 1993 Opinion, the Court stated at line 6:

> To create an implied contract, the offer or promise must be explicit.

Likewise, page 8 lines 18-20 of its July 21, 1993 Opinion, this Court stated:

> In examining implied employment contract cases, we have always required that the promise

> that is claimed to have altered the presumed at-will term be *sufficiently explicit* to give rise to *reasonable expectations* of termination for good cause only. (Emphasis added)

In the Court's June 14, 1993 Opinion, the Court stated at page 8 lines 18-19:

> In examining implied employment contract cases, we have always required that the promise claimed to alter the presumed at-will relationship be explicit.

In sum, the Court now talks in terms of "sufficiently explicit" and "reasonable expectations" rather than an absolute requirement that an offer be explicit. In requiring that the offer or promise be "sufficiently explicit," the Court apparently leaves it up to the jury to make the decision as to whether such a "sufficiently explicit" promise or offer has been made. As indicated in Plaintiff's original Response Brief filed January 16, 1992, and in Plaintiff's Motion for Rehearing and Memorandum in Support Thereof, with Addendum, there exists in the record, substantial evidence upon which a reasonable jury could find that the offer or promise in this case was "sufficiently explicit."

C. Changes at Page 9.

In its July 21, 1993 Opinion, this Court also modified its original Opinion at page 9 lines 8-11 wherein it stated:

> An employer creates expectations by establishing policies or making promises. An implied

> contract is created only where an employer creates a reasonable expectation. The reasonableness of expectations is measured by just how definite, specific, or explicit has been the representation *or conduct* relied upon. (emphasis added)

In its original Opinion of June 14, 1993, the Court stated:

> An employer creates expectations by establishing policies or making promises. An implied contract is created only where an employer creates a reasonable expectation. To create a reasonable expectation that the employer's right to discharge is restricted, the statement or policy must be explicit.

Thus, the Court appears to have modified its strict requirement that the statement or policy be explicit, to recognize that "reasonableness of expectation" can be measured by *conduct*, and is measured by just how sufficiently definite, specific or explicit the conduct relied upon has been. As indicated in the briefs previously filed by Plaintiff/Appellee in this case, the conduct of Defendant/Appellant has been that outside salesmen were employed for long periods of time, that Paxton considered itself like a family, and treated its employees accordingly, thus creating a reasonable expectation of "permanent" employment on the part of its employees, especially its outside salespeople.

This Court has recognized that "permanent" employment is to be equated with employment terminable only for cause. See page 4 Footnote 2 of this Court's July 21, 1993 Opinion, as well as its June 14, 1993 Opinion. This is significant because Plaintiff has always maintained that

he had a contract of "permanent employment" with Defendants until his retirement with Defendants. See para. 7 of Plaintiff's Complaint, RP 2. There was substantial evidence of conduct of Defendant to create a *reasonable expectation* of "permanent employment" of Plaintiff. See Arguments in Plaintiff's Response Brief pp. 13-18. Such substantial evidence should be dispositive of this case. Because substantial evidence exists that Plaintiff had a contract of permanent employment, Plaintiff could only be discharged for good cause. The jury found, and this Court has not questioned, that Defendant did not have good cause to terminate Plaintiff.

D. Changes at Page 11.

The Court also modified its original Opinion by stating at page 11 lines 17-19:

> As a matter of policy, this Court refuses to consider evidence that a company does not usually fire employees without a good reason, as *establishing* that the company does not maintain an at-will employment policy. (emphasis added)

The Court's original June 14, 1993 Opinion stated the proposition as follows:

> As a matter of policy, this Court refuses to consider evidence that a company does not usually fire employees without a good reason as *any indication* that the company does not maintain an at-will employment policy.

Thus the Court has modified its Opinion to a significant degree from refusing to consider such evidence as *any* evidence ("indication") that the company does not

maintain an employment at-will policy to a position of refusing to consider that such evidence *alone establishes* such a policy.[1] Plaintiff's position has *never* been that such evidence *alone* establishes such a policy; Plaintiff's position has always been that such evidence should be considered *together* with *all other evidence* (the totality of circumstances), in determining whether or not the company maintains a policy of terminating people only for good cause. It should be noted that Alan Crownover, Defendant's agent, stated in his deposition that he never fired anybody for no reason, one of the attributes of at-will employment. He also stated that of all individuals he terminated, he had a good reason in his own mind and that those reasons in a general sense were considered grounds for termination by company policy. See deposition of Alan Crownover p. 90. (Attached).

E. The issue of explicitness was not raised in the trial court.

It should be pointed out that the Defendant in its motions, jury instructions, and motions for directed verdict (TR Vol. VI pp. 140-142), failed to preserve the issue of explicitness which it has now presented to the Court, and upon which the Court places such strong emphasis. Issues not preserved below, should not be considered by the Court on appeal. SCRA 1986, 12-216(A); *Gerety v. Demers*, 86 N.M. 141, 520 P.2d 869 (1974); *State v. Gonzales*,

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[1] The Court appears to impliedly recognize that such evidence might be considered along with other evidence of the existence of an implied contract requiring good cause for discharge.

82 N.M. 388, 482 P.2d 252 (Ct. App.), *cert. denied*, 82 N.M. 377, 482 P.2d 241 (1971).

Specifically, the question of sufficiency of the evidence on a jury trial can only be preserved by calling the attention of the trial court "to the fact that it is committing error in allowing a claim to go to the jury." *First Nat'l Bank in Albuquerque v. Sanchez*, 112 N.M. 317, 320, 815 P.2d 613, 616 (1991). *See also, Pstragowski v. Metropolitan Life Ins. Co.*, 553 F.2d 1 (1st Cir. 1977) [decided under previous Federal Rule 50 which was the same as N.M. SCRA 1-050(A)] where the appellate court refused to review a verdict for evidence of malice in a wrongful discharge where the defendant's motion for a directed verdict failed to raise the issue. In the present case, Defendant's directed verdict motion failed to raise the issue of explicitedness, and therefore, this Court cannot review the evidence for sufficiency on that issue. *First Nat'l Bank in Albuquerque*.

F. Due process requires remand.

The Court in its revised Opinion of July 21, 1993, p. 9, has now established a new test for reasonableness of expectations. There was no jury instruction given to the jury by the Court below regarding the reasonableness of expectations of Plaintiff. There was, however, general evidence concerning the reasonableness of Plaintiff/Appellee's expectations. See deposition of Alan Crownover (attached) and other evidence reviewed in Plaintiff/Appellee's Response Brief. Therefore, it is proper for this Court to remand this cause for a new trial allowing the parties to tender evidence and the Court to

give a jury instruction concerning this new test of reasonableness of expectation. *First Nat'l Bank in Albuquerque*. Under the circumstances, failure to do so would deny Plaintiff his procedural due process rights guaranteed by the Fourteenth Amendment to the United States Constitution, as well as his right to a jury trial under the New Mexico State Constitution, Article II, Section 12. This Court has so drastically restated the law as to establish a new test concerning the reasonableness of expectations, and Plaintiff should be allowed his day in Court before the jury with an appropriate instruction and with the ability to argue to the jury that Plaintiff's expectations that he would be terminated only for just cause were reasonable. The jury should be allowed to make a decision on this issue. Failure to remand would deny Plaintiff procedural due process.

G. The Court should affirm the jury's decision.

Additionally, the Court, on page 11, lines 17-19 had indicated that it would refuse to consider evidence that the company does not usually fire employees without a good reason as *establishing* that the company does not maintain an at-will employment policy. Plaintiff throughout his argument, both to the Court, to the jury, and to this Honorable Court, had *never* stated that such evidence standing alone establishes that the company does not maintain an at-will policy, *but* that such evidence should be considered in connection with the totality of all the circumstances (including other evidence, the conduct of the parties, statements made in the employment manual, *and all other evidence* as indicated in Plaintiff's original

Response Brief filed herein), in determining whether or not Plaintiff had a reasonable expectation of employment terminable only for cause. Plaintiff's position is that this issue has already been decided by the jury and that the jury's verdict should be upheld.

WHEREFORE, Plaintiff respectfully requests this Court to reconsider its Opinion of July 21, 1993, to affirm the judgment or alternatively, at the very least, remand this case for a new trial, consistent with appropriate instructions based upon the new test of reasonable expectation, announced by the Court in its decision of July 21, 1993, and allow such new trial to proceed consistent with the requirements of due process, as required by the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

JEFF ROMERO
Attorney for Plaintiff
804 Fifth Street NW
Albuquerque, NM 87102
(505) 242-9000

I hereby certify that a true
and correct copy of the foregoing
was mailed to opposing counsel
this 5th day of August, 1993.

JEFF ROMERO

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

BILL HARTBARGER,

Plaintiff/Appellee,

vs.

FRANK PAXTON LUMBER COMPANY,

Defendant/Appellant.

No. 19,913
Lower Ct. No.
CV-89-05189

PLAINTIFF/APPELLEE'S THIRD MOTION AND MEMORANDUM BRIEF FOR RECONSIDERATION AND REHEARING

(Filed Sept. 30, 1993)

Appeal From Second Judicial District Court
Honorable Philip R. Ashby

JEFF ROMERO
Attorney for Plaintiff/Appellee
804 Fifth Street NW
Albuquerque, NM 87102
(505) 242-9000

ALBERT N. THIEL
Attorney for Defendant/Appellant
500 Copper NW, #103
Albuquerque, NM 87102
(505) 842-5602

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

BILL HARTBARGER,

Plaintiff/Appellee,

vs.

FRANK PAXTON LUMBER COMPANY,

Defendant/Appellant.

No. 19,913
Lower Ct. No.
CV-89-05189

PLAINTIFF/APPELLEE'S THIRD MOTION AND MEMORANDUM BRIEF FOR RECONSIDERATION AND REHEARING

COMES NOW the Plaintiff/Appellee in the above-referenced cause pursuant to S.C.R.A. 1986 Section 12-404, as amended, and respectfully moves the Court for reconsideration of its Second Modified Opinion in the above-entitled cause. As grounds for this Motion, Plaintiff states:

1. This Court's Opinion was filed June 14, 1993.

2. By Motion and supporting memorandum filed June 25, 1993, and by Addendum filed June 29, 1993, Plaintiff/Appellee moved this Court for rehearing of its decision of June 14, 1993.

3. On July 21, 1993, this Court denied Plaintiff/Appellee's Motion for Rehearing, but the Court modified its disposition. Based on the modification of its disposition, Plaintiff/Appellee again filed a Motion for Reconsideration and Rehearing on August 5, 1993.

4. Pursuant to that Motion, the Court again modified its decision by Opinion Order dated September 15, 1993, to read **"As a matter of policy, this Court will not consider evidence that a company does not usually fire employees without a good reason as *by itself* establishing that the company does not maintain an at-will employment policy."**

5. Defendant's witness Crownover's statement that the company did not usually fire employees without a good reason was *not* the sole evidence establishing an implied contract of employment between Plaintiff and Defendant.

6. Additional evidence establishing such an implied contract consisted of the following:

a. A "Getting Acquainted Manual" listed specific grounds for discharge and discipline;

b. Defendant's witness Crownover stated that as long as Plaintiff kept his sales up, he would have nothing to worry about even if the company were taken over by another company;

c. Plaintiff was employed by Defendant for a total of twenty-three (23) years;

d. Plaintiff had a vested retirement plan with Defendant.

7. This Court, in its previous modification, indicated that the offer or promise must be "sufficiently explicit" in order to give rise to an implied contract of employment.

8. The Court has now stated in its most recent modification that evidence that the company does not usually fire employees without a good reason does not *by* itself establish that the company does not maintain an at-will employment policy. The grounds for discharge and discipline in the "Getting Acquainted" manual, when considered together with Defendant's policy of not firing employees without cause is sufficiently explicit to raise a reasonable reliance on the part of employees that if they followed the rules, they would not be discharged. The Court's arguments rejecting the Plaintiff's evidence ignore the fact that *nowhere* in the "Getting Acquainted" manual, which was actually received by Plaintiff, is there anything that indicates that he is an employee "at-will". Rather, specific grounds for discipline and discharge are listed in the manual. There would be no need to list such *explicit* grounds for discipline and discharge if the company maintained an "at-will" employment policy. This is supported by the fact that the Defendant Paxton Lumber Company did not, in fact, maintain an "at-will" policy. Crownover testified that they did not fire people without a good reason. The good reasons were listed in the "Getting Acquainted" Manual. This evidence was presented at trial.

9. Further, if this case were remanded for a new trial under the Court modified opinion, Plaintiff reasonably believes that he can establish that other individuals discharged from Defendant's employment were discharged for reasons consistent with the grounds listed on page 11 of the "Getting Acquainted" manual and were *not* discharged at-will. See Crownover deposition pp.

87-91 attached hereto and incorporated herein by reference.

10. When considered in light of Paxton's consistent employment practices in the past, over time, Paxton's "Getting Acquainted" manual stands by itself as a "sufficiently explicit" offer or promise giving rise to an implied employment contract.

11. This Court has recently allowed the admission of extrinsic evidence to both establish the existence of ambiguities and to interpret terms in express contracts. *Mark IV v. Mellekas*, ___ N.M. ___, 845 P.2d 1232 (1993). Certainly the Court should not establish a more rigid test for the admission of extrinsic evidence to establish implied contracts than it allows in establishing the terms of express contracts.

Therefore, this Court should reconsider its decision to exclude evidence of Defendant's discharge policies in light of the "Getting Acquainted" manual, Plaintiff's long term employment, Plaintiff's vested pension and personal assurances made to Plaintiff at the time of a proposal take-over. *Kinoshita v. Canadian Pacific Airlines*, 724 P.2d 110, 117 (Hawaii, 1986).

WHEREFORE, Plaintiff/Appellee prays the Court to withdraw its Second Modified Opinion of September 15, 1993, to affirm the judgment, or in the alternative, to remand the case for a new trial with appropriate

instructions based upon the principles of law announced in this Court's Second Modified Opinion.

Respectfully submitted,

JEFF ROMERO
Attorney for Plaintiff/Appellee
804 Fifth Street NW
Albuquerque, NM 87102
(505) 242-9000

I hereby certify that a true
and correct copy of the foregoing
was mailed to opposing counsel on
this 30th day of September, 1993.

JEFF ROMERO

AMENDMENT V TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VII TO THE UNITED STATES CONSTITUTION

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.